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PROCEEDINGS AND ORDERS DATE: 030885

CASE NBR 84-1-00914 CSX
SHORT TITLE St. Louis Southwestern Ry. DOCKETED: Dec 6 1984
VERSUS Dickerson, Robert W.

Date	Proceedings and Orders
Dec 6 1984	Petition for writ of certiorari filed.
Oct 5 1984	Application for stay filed, and order granting same by Blackmun, J.. on Oct. 6, 1984.
Jan 4 1985	Brief of respondent Robert Wayne Dickerson in opposition filed.
Jan 9 1985	DISTRIBUTED. February 15, 1985
Jan 15 1985	Reply brief of petitioner St. Louis Southwestern Ry. filed.
Feb 19 1985	REDISTRIBUTED. February 22, 1985
Feb 25 1985	REDISTRIBUTED. March 1, 1985
Mar 4 1985	Petition GRANTED. Judgment REVERSED. Dissenting statement by Justice Marshall. Opinion per curiam. Justice Powell OUT.

****

84-914 (1)

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ST. LOUIS SOUTHWESTERN RAILWAY CO.,
Petitioner,

vs.

ROBERT WAYNE DICKERSON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS EASTERN DISTRICT

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QUESTIONS PRESENTED FOR REVIEW

I. THE MANDATORY INSTRUCTION SYSTEM OF THE MISSOURI SUPREME COURT PROHIBITS GIVING A PRESENT VALUE INSTRUCTION TO THE JURY IN AN FELA CASE, CONTRARY TO THE DECISIONS OF THIS COURT AND THE UNITED STATES COURTS OF APPEALS. THEREFORE, THE MISSOURI COURT OF APPEALS IN *DICKERSON V. ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,* 674 S.W.2d 165 (MO. APP. 1984), PREJUDICIALLY ERRED IN FOLLOWING THE MISSOURI SUPREME COURT'S MANDATE AND SUSTAINING THE TRIAL COURT'S REFUSAL OF THE PRESENT VALUE INSTRUCTION WHICH PETITIONER TENDERED IN THIS CASE.

II. THE MISSOURI COURT OF APPEALS IN *DICKERSON V. ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,* 674 S.W.2d 165 (MO. APP. 1984) ERRONEOUSLY DENIED PETITIONER EQUAL PROTECTION UNDER THE LAW BECAUSE IT OBEYED THE MISSOURI SUPREME COURT'S REQUIREMENT OF THE EXCLUSIVE USE OF ITS MISSOURI APPROVED INSTRUCTION 8.02,THE JURY INSTRUCTION FOR DAMAGES IN PERSONAL INJURY FELA CASES, BECAUSE M.A.I. 8.02 DOES NOT REQUIRE A PROXIMAL RELATIONSHIP BETWEEN THE DEFENDANT'S CONDUCT AND PLAINTIFF'S DAMAGES WHEREAS ALL OTHER MISSOURI APPROVED INSTRUCTIONS ON DAMAGES DO HAVE THIS REQUIREMENT.

III. THE MISSOURI COURT OF APPEALS IN *DICKERSON V. ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,* 674 S.W.2d 165 (MO. APP. 1984) ERRED IN AFFIRMING THE ONE MILLION DOLLAR JURY AWARD AS NOT EXCESSIVE BECAUSE THE EVIDENCE DID NOT

WARRANT AN AWARD OF SUCH MAGNITUDE AND BECAUSE RESPONDENT'S COUNSEL MADE IMPERMISSIBLE CLOSING ARGUMENT REGARDING THE VALUE OF ANY AWARD AND FURTHER BECAUSE THE PETITIONER WAS NOT PERMITTED TO SUBMIT A PRESENT VALUE INSTRUCTION TO THE JURY.

LIST OF PARTIES

In compliance with Rule 28, Petitioner states the following:

Petitioner St. Louis Southwestern Railway Company owns directly a portion of the capital stock of the following companies:

1. Alton & Southern Railway Company
2. Arkansas & Memphis Railway Bridge & Terminal Company
3. Kansas City Terminal Railway Company
4. Southern Illinois Railway & Bridge Company
5. Terminal Railroad Association of St. Louis
6. Trailer Train Company, Inc.

Over ninety-nine percent of the stock of the St. Louis Southwestern Railway Company is owned by the Southern Pacific Transportation Company. The stock of the Southern Pacific Transportation Company is owned by the Santa Fe Southern Pacific Company.

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DECISIONS WHICH PETITIONER SEEKS TO HAVE REVIEWED

Dickerson v. St. Louis Southwestern Railway Company, 674 S.W.2d 165 (Mo. App. 1984), Application for Transfer to Missouri Supreme Court denied September 11, 1984.

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ST. LOUIS SOUTHWESTERN RAILWAY CO.,
Petitioner,

vs.

ROBERT WAYNE DICKERSON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS EASTERN DISTRICT

JURISDICTIONAL STATEMENT

St. Louis Southwestern Railway Company (hereafter referred to as Petitioner), filed this Petition for Writ of Certiorari subsequent to an adverse verdict in the Circuit Court of the City of St. Louis in an action brought under 45 U.S.C. §51 et. seq. (F.E.L.A.). Petitioner appealed to the Missouri Court of Appeals, Eastern District and that court affirmed the jury verdict in *Dickerson v. St. Louis Southwestern Railway Company,* 674 S.W.2d 165 (Mo. App. 1984). Petitioner properly filed with the Court of Appeals a Motion for Rehearing and in the alternative an Application for Transfer to the Missouri Supreme Court. After the Court of Appeals denied those motions (Appendix C), Petitioner filed an Application for Transfer with the Missouri Supreme Court pursuant to Rule 83.03 (Appendix K).

On September 11, 1984, the Missouri Supreme Court denied Petitioner's Application for Transfer. (Appendix B). Petitioner has ninety (90) days to file its Petition for Writ of Certiorari with this Court. Therefore this Petition is timely filed. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3). The questions presented involve the invalidity and unconstitutionality of certain pattern, mandatory jury instruction promulgated by the Missouri Supreme Court (Missouri Approved Instructions)[1] for FELA cases and a resultant excessive verdict and the Court of Appeals' decision in this case because it is contrary to the decisions of this Court and the Federal Courts of Appeal.

CONSTITUTIONAL PROVISIONS

Constitution of the United States

Amendment 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

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[1] M.A.I. is an acronym for Missouri Approved Instruction. The Missouri Supreme Court promulgates mandatory pattern jury instructions. The court is aided by the M.A.I. Committee.

Missouri Constitution, Article I, §2

Promotion of general welfare—natural rights of persons —equality under the law—purpose of government

Section 2. That all constitutional government is intended to promote the general welfare of the people; that all persons have a natural right to life, liberty, the pursuit of happiness and the enjoyment of the gains of their own industry; that all persons are created equal and are entitled to equal rights and opportunity under the law; that to give security to these things is the principal office of government, and that when government does not confer this security, it fails in its chief design.

STATEMENT OF THE CASE

Although the *Dickerson* opinion, (see Appendix A) sets out in detail the factual accounts of the event in question, Petitioner will sketch a brief factual summary thereof. This case was tried in December, 1982. The injured railroad worker, Mr. Dickerson was thirty years old when he was allegedly injured on December 11, 1978. At that time Respondent Dickerson was a railroad policeman and was climbing on multi-level railroad cars which were loaded with Cadillac automobiles. His purpose was to inspect them for possible vandalism. In climbing from one level to the next on one of the cars, Respondent fell to the ground and landed on his back. He brought suit under the Federal Employers Liability Act (hereafter FELA) against St. Louis Southwestern Railway Company, his employer, alleging that the railroad had failed to provide him: (1) reasonably safe work conditions, (2) reasonably safe appliances, (3) reasonably safe methods of work, and (4) reasonably adequate help. Pursuant to a verdict directing instruction submitting to the jury the issues whether Petitioner either failed to provide reasonably safe conditions for work or reasonably safe methods for work, the jury found for plaintiff and awarded him $1,000,000.00 in damages.

Petitioner filed a timely motion for new trial but the trial court denied that motion. Petitioner appealed to the Missouri Court of Appeals, Eastern District which affirmed the judgment in *Dickerson v. St. Louis Southwestern Railway Company,* 674 S.W.2d 165 (Mo. App. 1984). Petitioner then filed with the Court the Motion for Rehearing and in the alternative an Application for Transfer to the Missouri Supreme Court which were both denied. (Appendix C). Petitioner next filed an Application for Transfer with the Missouri Supreme Court, seeking review of the *Dickerson* opinion. On September 11, 1984, the Missouri Supreme Court denied the Application for Transfer. (A copy of the order is contained in Appendix B).

The issues raised herein concern Missouri jury instructions practice as required by the Missouri Supreme Court and an excessive verdict resulting therefrom. Under Missouri Supreme Court Rule 70.02 (see Appendix D) it is clear that Missouri Approved Instructions are mandatory and are to be used to the exclusion of any others. For purposes of clarity, each of these issues addressed will be set out hereunder with separate headings with additional facts set out in the Argument where appropriate.

Present Value Instruction

At the instruction conference, counsel for Petitioner tendered, and the court refused, an instruction to have the jury reduce the award to its present value. (See Appendix E for the instruction conference transcript and see Appendix F for the text of this instruction, marked as Instruction G, which the trial court refused). In accordance with Missouri Supreme Court Rule 70.03, Petitioner raised in its Motion for New Trial the fact that it had tendered a present value instruction and that it was refused. (See Appendix G, Paragraph 10). Petitioner also there argued that to refuse to give a present value instruction was erroneous because the Petitioner was entitled to have the jury consider the present value rule under controlling federal law. The

trial court denied the Motion for New Trial. (See Appendix H). Petitioner then raised the issue in the Missouri Court of Appeals, Eastern District where the point was ruled against it. *Dickerson, supra,* 674 S.W.2d at 171. (See Appendix A). Subsequent to that decision, Petitioner filed an Application for Transfer with the Missouri Supreme Court and there raised the issue again. (See Appendix I for points of error raised in the courts below). That court denied the Application for Transfer on September 11 (see Appendix B for the court order).

Difference In Causal Requirement For Damages In FELA Personal Injury Cases Denies Petitioner Equal Protection

In its Motion for New Trial, defendant raised the fact that M.A.I. 8.02 [the damages instruction for FELA personal injury cases] deprived it of equal protection under the law of the United States Constitution and the Missouri Constitution. (See Appendix G, para. 12). This is because the Missouri Supreme Court, through its Missouri Approved Instructions, requires that the plaintiff's damages directly result from the plaintiff's injuries in all cases except for FELA cases involving personal injury (as opposed to wrongful death). There is no rational distinction here and this results in Petitioner's being denied equal protection under the law. Petitioner raised this point of error in its Motion for New Trial (see Appendix G, paragraph 12). The Missouri Court of Appeals, Eastern District, in *Dickerson* ruled against Petitioner on this point. 674 S.W.2d, at 171. (see Appendix A). The Missouri Supreme Court refused to review that determination when it denied Petitioner's Application for Transfer on September 11, 1984. (Appendix B).

The Excessive One Million Dollar Verdict In This Case Resulted From Erroneous Missouri Approved Instruction System

The verdict and judgment in this case was One Million Dollars ($1,000,000.00). Respondent, at the time of trial, was

thirty-four years of age. His past wage loss from the date of the injury to the time of trial was allegedly Sixty-Three Thousand One Hundred Eighty Dollars Thirty-Three Cents ($63,180.63). In January, 1983 plaintiff purportedly would have earned Twenty-Four Hundred Dollars ($2,400) per month and he provided evidence that he could work until he was sixty-five to seventy years of age. His total claimed wage loss was Nine Hundred Two Thousand Six Hundred Twenty Dollars ($902,620.00) if he worked until he was sixty-five, and One Million Fifty-One Thousand Four Hundred Twenty Dollars ($1,051,420.00) if he worked until he was seventy. Additional facts will be set out in the argument portion for this issue. This point of error was timely raised in Petitioner's Motion for New Trial (Appendix G, para. 28, 29).

REASONS FOR GRANTING THE WRIT

I. The Mandatory Instruction System Of The Missouri Supreme Court Prohibits Giving A Present Value Instruction To The Jury In An FELA Case, Contrary To The Decisions Of This Court And The United States Courts Of Appeals. Therefore, The Missouri Court Of Appeals In *Dickerson v. St. Louis Southwestern Railway Company*, 674 S.W.2d 165 (Mo. App. 1984), Prejudicially Erred In Following The Missouri Supreme Court's Mandate And Sustaining The Trial Court's Refusal Of The Present Value Instruction Which Petitioner Tendered In This Case.

It is undisputed that the issue of damages in an FELA case is governed by federal law to the exclusion of state law on that issue. *Norfolk & Western Railway v. Liepelt,* 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980). In 1916, this Court held that an FELA defendant has a right as a matter of federal law, to an instruction telling the jury that they are to award damages on the basis of present value only. *Chesapeake & Ohio Railway Company v. Kelly,* 241 U.S. 485, 491, 36 S.Ct. 630, 60 L.Ed. 1117 (1916). The viability of *Kelly* was very recently recognized by this Court in *Jones and Laughlin Steel Corporation v. Pfeifer,* ____ U.S. ____, 76 L.Ed2d 768, 103 S.Ct. 2541 (1983) where it stated:

> It has been settled since our decision in *Chesapeake & Ohio R.C. v. Kelly,* [citation omitted], that in all cases where it is reasonable to suppose that interest may be safely earned upon the amount that is awarded, the ascertained future benefits ought to be discounted in the making up of the award.

____ U.S. ____, 76 L.Ed. 2d at 783, 103 S.Ct. ____.

The theory underlying this is the plaintiff's duty to mitigate the amount of his damages and in these circumstances he could certainly do so by placing the money in an interest bearing ac-

count. *Chesapeake & Ohio R. Co., supra,* 241 U.S. at 489; *Jones & Laughlin Steel Corp. v. Pfeifer,* 76 L.Ed.2d, at 783, n.20. *Kelly* has not been overruled, and has been cited in countless cases dealing with the present value instruction issue. Moreover, Petitioner has yet to find a case which affirms a verdict where a proper present value instruction was requested and refused and where the jury rendered its verdict without any present value instruction being given. For example, in *Beanland v. Chicago Rock Island & Pacific Railroad Company,* 480 F.2d 109 (8th Cir. 1973), the Eighth Circuit Court of Appeals, citing extensive authority, held that failure to give a present value instruction in an FELA case was prejudicial error. 480 F.2d at 115. The *Beanland* court relied directly on *Kelly, supra,* in reversing the case because no present value instruction of any kind was given. 480 F.2d at 114. *Beanland* also cited *Sleeman v. Chesapeake & Ohio Railway Company,* 414 F.2d 305 (6th Cir. 1969), where no present value instruction was given and the court remanded the case for a recomputation of the damages based on the *Kelly* "present worth formula." 480 F.2d at 115. Nor does there need be any intricate formula submitted to the jury to aid them in arriving at present value - they can properly apply the rule upon being told that the award should be only present money value. *Duncan v. St. Louis-San Francisco Railway Company,* 480 F.2d 79, 87 (8th Cir. 1973), *cert. denied,* 414 U.S. 859, 38 L.Ed.2d 109, 94 S.Ct. 69 (1973). *Heater v. Chesapeake & Ohio Railway Company,* 497 F.2d 1243 (7th Cir. 1974), *cert. denied,* 419 U.S. 1013, 42 L.Ed. 287, 95 S.Ct. 333 (1974).

In denying Petitioner's claim of error of the trial court's refusal to give the tendered present value instruction, the Missouri Supreme Court made clear that its position is that the M.A.I. scheme or system does not allow for a present value instruction and therefore Missouri juries cannot be instructed on the present value issue. *Dickerson v. St. Louis Southwestern Railway Company,* 674 S.W.2d 165 at 171 (See Appendix A);

see also, Bair v. St. Louis San-Francisco Railway Company, 647 S.W.2d 507, 510[2] (Mo. banc 1983). Given that the unanimous weight of authority is that if requested, the present value instruction must be given, the Missouri courts are clearly contrary to opinions of this Court, notably that in *Kelly, supra,* and *Jones & Laughlin Steel Corp., supra.*

Moreover, the instruction tendered here was adequate and acceptable under *Kelly,* because it would merely have informed the jury as follows:

> If you find in favor of plaintiff and decide to make an award for any loss of earning in the future, you must take into account the fact that the money awarded by you is being received all at one time instead of over a period of time extending into the future and that plaintiff will have the use of this money in a lump sum. You must therefore determine the present value or present worth of the money which you award for such future loss.

(This was Instruction No. G tendered by Petitioner to the trial court, but refused by that court. See Appendix F). The instruction is short and straightforward and embodies the concept of mitigation of damages articulated in *Chesapeake & Ohio Railway Company v. Kelly, supra* and *Jones & Laughlin Steel Corp. v. Pfeifer,* ____ U.S. ___, 76 L.Ed.2d 768, 103 S.Ct. 2541, (1983). See also, *Gulf, C. & S.F. R. Co. v. Moser,* 275 U.S. 133, 135-136, 72 L.Ed. 200, 201-202 (1927) (exemplar instruction set out). The tendered instruction is a correct statement of the law. The reason for its refusal by Missouri Courts is merely that they refuse to include it in the required Missouri damage instructions. This refusal is plainly contrary to this Court's decisions and is prejudicial to FELA defendants sued in Missouri state court.

Petitioner tendered a proper present value instruction, had it refused by the trial court, objected to that refusal, and has properly preserved its objection up through the appellate process to

this Court. This point of error involves a fixed, substantive right for FELA defendants under federal law and should not be resolved against Petitioner merely because the appellate courts of Missouri refuse to follow controlling federal law. Therefore, Petitioner prays this Court to issue its Writ of Certiorari on this point of error and to order a retrial in this case with Petitioner having the right to submit a present value instruction to the jury.

II. The Missouri Court Of Appeals In *Dickerson v. St. Louis Southwestern Railway Company*, 674 S.W.2d 165 (Mo. App. 1984) Erroneously Denied Petitioner Equal Protection Under The Law Because It Obeyed The Missouri Supreme Court's Requirement Of The Exclusive Use Of Its Missouri Approved Instruction M.A.I. 8.02, The Jury Instruction For Damages In Personal Injury FELA Cases, Because M.A.I. 8.02 Does Not Require A Proximal Relationship Between The Defendant's Conduct And The Plaintiff's Damages Whereas All Other Missouri Approved Instructions On Damages Do Have This Requirement.

In the case at bar, the trial court gave M.A.I. 8.02 (modified for this case), marked as Instruction No. 9, which provides as follows:

> If you find the issues in favor of plaintiff, then you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe he sustained and is reasonably certain to sustain in the future *as a result* of the fall on December 11, 1978, mentioned in the evidence. Any award you make is not subject to income tax.
>
> If you find plaintiff contributorily negligent as submitted in Instruction No. 8, then you must diminish the sum in proportion to the amount of the negligence attributable to plaintiff. (emphasis added).

M.A.I. 8.02 (the damages instruction for FELA personal injury cases). The M.A.I. Committee's Comment to M.A.I. 8.02 states that the instruction is the same as the ordinary negligence damage instruction (M.A.I. 4.01) except that the word "direct" has been removed as a modifier of "result." (See Appendix J for the Committee Comment to 8.02). This was done, the Committee explains in the Comment, to comport with federal substantive law of the FELA. On the contrary, Petitioner submits that present M.A.I. 8.02 is a gross and prejudicial departure from federal law.

This action by the Missouri Supreme Court through its M.A.I. Committee shows that the Court is erroneously blurring together the two separate issues of (1) an FELA employer's threshhold liability for injuries sustained, and (2) the damages [directly] caused by the injury. With an obvious purpose, the FELA alters the causation component of common law negligence and reduces the question of an FELA employer's liability to whether any negligent acts by the employer played any part in the employee's injury. *Crane v. Cedar Rapids and I.C. Railway Co.*, 395 U.S. 164 (1969); *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 506-507 (1957). However, this statutorily created standard of causation is designed only to aid the FELA plaintiff on the threshhold issue of liability. Certainly, a plaintiff is entitled only to damages which he can prove were directly or proximately caused by the injury for which he is suing. *Holladay v. Chicago, Burlington and Quincy Railroad Co.*, 255 F.Supp. 879, 887 (D.C. Iowa 1966).

The United States Supreme Court has shown that its members clearly perceive the distinction between these two aspects of this issue; in *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 506-507, the court said:

> [T]he test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. (Footnote omitted).

Rogers v. Missouri Pacific Railroad Co., 352 U.S. 500, 1L.Ed.2d 493, 77 S.Ct. 443, 77 S.Ct. 443 (1957). The soundness of the proposition that proximate cause is still required between the injury sued for and the alleged damages is almost too obvious to require citation. Many cases have expiicitly held it applies in FELA cases. *E.g., Chesapeake & Ohio Railway v. Carnahan,* 241 U.S. 241, 244-245, 60 L.Ed. 979, 36 S.Ct. 594 (1916); *Shupe v. New York Central System,* 339 F.2d 998 (7th Cir. 1965) cert. denied 381 U.S. 937, 14 L.Ed.2d 701, 85 S.Ct. 1769 (1965); *Harris v. Norfolk Southern Railway,* 319 F.2d 493 (4th cir. 1963) cert. denied 375 U.S. 985, 11 L.Ed.2d 473, 84 S.Ct. 517 (1964); *Holladay v. Chicago, Burlington and Quincy Railroad Co.,* 255 F.Supp. 879, 887 (S.D. Iowa 1966).

Most all jurisdictions realistically accommodate the proximate cause issue for damages. Some utilize separate instructions on causation and/or separate instructions on each element of damage. *E.g.,* see Illinois Pattern Jury Instructions-Civil (2nd Ed. 1971). Prior to the M.A.I. system in Missouri, the damage instruction could at least specify each proper element of damage for the jury's consideration. *E.g., Pierce v. New York Central Railway Company,* 257 S.W.2d 84, 89 [8] (Mo. 1953). Some jurisdictions use special verdicts or interrogatories for the jury. *E.g., Gallick v. Baltimore & Ohio Railway Co.,* 372 U.S. 108, 9 L.Ed.2d 618, 83 S.Ct. 659 (1963). Such approaches limit the jury to considering only proper elements of damage when determining an award. Any of these approaches would be better than that which the State of Missouri has in its M.A.I. which permits the jury to engage in the broadest kind of speculation and conjecture.

The Missouri Supreme Court's position that federal law does not require that damages directly or proximately result from the injury is a misstatement of substantive federal law as to damages under the FELA. The United States Supreme Court has stated that such a causal relation must exist. *See, Chesapeake & Ohio Railway Co. v. Carnahan,* 241 U.S. 241, 244-245, 60 L.Ed. 979 (1916). This erroneous declaration of

federal law by the highest court of a state certainly constitutes grounds for allowing a writ of certiorari to issue. *Seaboard Air Line Ry. v. Padgett,* 236 U.S. 668, 35 S.Ct. 481, 59 L.Ed. 777 (1915).

What is most alarming here is that in the legal philosophy of the Supreme Court of Missouri, the absence of the adjective "direct" in a damage instruction (in all but an FELA case) is prejudicially erroneous because it allows a jury to speculate and consider damage indirectly caused. To this effect, the Missouri Supreme Court has stated:

> The deletion of the word "direct" as a modifier of "result" changes the meaning of the instruction. Damages sustained as the result of an occurrence would include all such damages, whether resulting directly or indirectly. Only if the word "direct" is kept in the instruction is the jury told that the damages which it may award must be the direct result of the occurrence. The word "direct" adds a limiting factor not otherwise included.

Brown v. St. Louis Public Service Co., 421 S.W.2d 255, 257 (Mo. banc 1957); *See also Chappell v. City of Springfield,* 423 S.W.2d 810, 812 (Mo. 1968) (citing *Brown, supra*). Therefore, as the Missouri Supreme Court sees it, in all except FELA cases, failure to use the adjective "direct" to modify "result" in instructing a jury on the proper scope of damages, is to erroneously and prejudicially allow that jury to consider elements of damage not directly or proximately resulting from plaintiff's injury which was caused by the defendant's acts. Yet, the Missouri Supreme Court finds the omission of the word "direct" is not only proper, but *required,* by federal law when instructing the jury on damages in an FELA case.

There are at least two substantial and injurious ramifications of the present language in M.A.I. 8.02. First, an FELA plaintiff's burden of proof on damages is altered by making it less than the burden intended by Congress and less than it has been interpreted to be by the United States Supreme Court. Second,

FELA defendants are erroneously subjected to a jury's propensity to speculate and the instruction permits them to make awards on the basis of damages not proximately caused by the injury for which plaintiff seeks recovery.

There is yet another prejudice that results from the fact that M.A.I. 8.02 fails to require a direct or proximate causal link between a plaintiff's injuries and his damages—the denial of equal protection under the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States and by Article I, §2, of the Missouri Constitution. By contrast, M.A.I. 8.01 (the damages instruction for FELA wrongful death cases) does require that a plaintiff's damages directly result from his injuries. Therefore, personal injury FELA defendants are the only Missouri defendants discriminated against by being denied a "direct" causal link between a plaintiff's injury and damages. M.A.I. 8.01 provides in pertinent part as follows:

> 8.01 Damages - Death of Employee Under FELA.
>
> If you find in favor of plaintiff, then you must award plaintiff such sum as you believe will fairly and justly compensate (list the beneficiary; *i.e.,* the widow, minor children, parents, ets.) for (her, his, their) losses which can reasonably be measured in money which you believe (she, he, they) sustained as a *direct* result of the death of (name of decedent) [and if you believe decedent endured pain and suffering *directly* resulting from his injuries then in addition you must add to such sum an amount that would fairly and justly compensate a decedent for such pain and suffering]. . .(footnotes omitted) (emphasis added).

The text of M.A.I. 8.02 was set out above, it contains neither "direct" nor "directly."

It is well settled that a classification created by state action is violative of the equal protection clause unless it is reasonable and bears a rational relation to the ends of the act. *Weber v. Missouri State Highway Commission,* 639 S.W.2d 825, 829-830 (Mo. 1982). There is no reason in case law or logic to

distinguish the requisite causal connection for damages in an FELA personal injury case from that in an FELA wrongful death case or non-FELA case. Moreover, there is no reason to distinguish between these two situations on the issue of losses which can be measured in money, which is included in the wrongful death instruction, but is not included in the personal injury instruction. Furthermore, since the question of damages in FELA cases is one of federal law, personal injury FELA defendants are being denied equal protection under the law by the Missouri Supreme Court. As a practical matter, comparison of M.A.I. 8.01 and 8.02 and non-FELA damages instructions of the M.A.I. shows that the Missouri Supreme Court misunderstands the FELA on the issue of required causal connection between the injury and damage claimed to result therefrom as well as what the proper elements of damages are. Petitioner asserts that this misunderstanding denies it rights under federal law and discriminates unconstitutionally between personal injury FELA defendants on the one hand and wrongful death FELA defendants and non-FELA defendants on the other.

For these reasons, defendant St. Louis Southwestern Railway Company requests this court to reverse the case below and to remand it with an order for the trial court to submit M.A.I. 8.02 modified as pointed out above.

III. The Missouri Court of Appeals In *Dickerson v. St. Louis Southwestern Railway Company,* 674 S.W.2d 165 (Mo. App. 1984) Erred In Affirming The One Million Dollar Jury Award As Not Excessive Because The Evidence Did Not Warrant An Award Of Such Magnitude And Because Respondent's Counsel Made Impermissible Closing Argument Regarding The Value Of Any Award And Further Because The Petitioner Was Not Permitted To Submit A Present Value Instruction To The Jury.

The record shows that Respondent's injuries were serious but not totally disabling as argued. Respondent had a history of

back problems. When he was 17 years old in 1965, Respondent fell on his back and was hospitalized for three days. He was subsequently hospitalized again in Centreville, Illinois for that injury. He later was injured in an auto collision when he was in a car that was rear-ended. In 1969, he consulted Dr. Frank A. Palazzo, a neurosurgeon, about his back. Dr. Palazzo prescribed a lumbosacral belt for Respondent to wear, and had him undergo a myelogram. Respondent also admitted that when he worked at the General Motors' plant in the early 1970's he fell off a material rack onto his back.

Respondent also had a history with regard to his depression which he claimed was a result of the December, 1978 incident. When he was 13 years of age he went to hospitals on two different occasions for nerves and anxiety in September and November of 1961. Therefore, Respondent has had a history of being depressed and it is clear that the accident alone is not the cause of his depression, but rather merely a circumstance which provides a focal point for his general depression.

Furthermore, Petitioner wrote Respondent a letter and informed him that if he could do the work, he could return to the railroad at his previous job. As well, the railroad employed Respondent on light duty—a job different from railroad policeman—until March of 1981 at regular pay. There was also expert testimony that Respondent would recover and that he was not totally disabled and, therefore, could work in a job which was sedentary in nature.

This excessive verdict resulted from passion and prejudice of the jury. Respondent was allowed to put to the jury evidence of his depression because he allegedly could not have a normal life with his wife and cannot play with his children. As recorded in the *Dickerson* opinion (see Appendix A), this evidence obviously goes beyond the permissible scope of FELA damages of reasonably certain pecuniary loss and into the areas of consortium. In addition, and most aggregious, Respondent argued to the jury that they could take into account that he would get a five percent annual increase in salary when awarded money for

lost wages (see Appendix L for a copy of the transcript of this argument). This terribly inflated the figure prayed for by 100%—Respondent's counsel himself attempted to put a $2 million figure before the jury with this formula being used.

Is this verdict excessive? Consider that this one million dollar ($1,000,000) verdict if conservatively invested in tax-exempt bonds at ten percent annual interest could earn one hundred thousand dollars ($100,000) per year. This is much more than the thirty-five thousand dollars ($35,000) (before taxes) per year Respondent was earning while working for the railroad and is much more than he could ever hope to earn there. Remember too, that this $100,000 per year is merely interest and the $1,000,000 principal is not depleted by one penny.

The major factor in this excessive verdict is that the jury was improperly instructed in that no present value instruction was permitted due to the Missouri instruction practice prohibiting it. This prejudice was heightened by Respondent's argument that the jury could consider that his salary would increase at an annual rate of five percent (Appendix L contains the transcript setting this out). Petitioner objected to this argument at trial and raised the point of error in its Motion for New Trial (Appendix G, para. 26). The Court of Appeals denied this point on appeal. *Dickerson, supra,* 674 S.W.2d at 170 [5]. (See Appendix A). As pointed out above, under this view, plaintiff's wage loss would have been $2,000,000.

Although FELA defendants are told by Missouri courts that they may argue to the jury that they should reduce their verdict to present value, *Bair v. St. Louis San-Francisco Ry. Co.*, 647 S.W.2d 507, 513 [12] (Mo. banc 1983), those courts also allow the plaintiff to tell the jury that they should inflate their verdict, as was the case here. Without an instruction on present value to submit to a jury, how would they ever know that is the law they must follow? In most every trial a jury is told that the court gives them the law in the form of the instructions and they are

told that what lawyers say is neither the law nor evidence. Can Missouri courts in any way be following this Court's mandate when they hold that defendants may argue present value to a jury but may not have an instruction to that effect?

The time has come for this Court to make clear to the Missouri Supreme Court that it must follow decisions of the United States Supreme Court and that it must allow FELA defendants to give a present value instruction to juries.

CONCLUSION

For all the above reasons, Petitioner requests this Court to issue its Writ of Certiorari to the Missouri Court of Appeals, Eastern District, and to provide relief sought by Petitioner.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

DIVISION ONE

No. 46998

Robert Wayne Dickerson,
Plaintiff-Respondent,

vs.

St. Louis Southwestern Railway Company,
Defendant-Appellant.

Appeal from the Circuit Court
of the City of St. Louis

Hon. Ivan Lee Holt, Jr.,
Judge

OPINION FILED: June 5, 1984

Plaintiff-respondent Robert Wayne Dickerson obtained a jury verdict and judgment for $1,000,000 against defendant-appellant St. Louis Southwestern Railway Company. Respondent was injured when he fell from a railroad car and landed on his buttocks and low back on the ballast rock below. He sued the railroad for his injuries pursuant to 45 U.S.C.A. Section 51 et seq., commonly known as the Federal Employer's Liability Act (FELA). The railroad appeals. The judgment is affirmed.

Appellant contends the trial court erred: (1) in overruling its objections to respondent's reference in opening statement to, and evidence of, the "blue flag rule;" (2) in refusing to submit appellant's tendered present value instruction; (3) in denying appellant's motion for new trial because of respondent's allegedly improper argument regarding the computation of

damages; (4) in submitting a modified form of MAI 8.02, the damage instruction; (5) in submitting MAI 8.02 as the damage instruction because MAI 8.02 allows the jury to speculate as to damages; (6) in submitting MAI 8.02 because MAI 8.02 deprived appellant of equal protection under the law; (7) in refusing to submit appellant's Instruction H, which would have instructed the jury not to speculate as to damages; (8) in submitting MAI 24.01 as the verdict directing instruction; (9) in denying appellant's motion for a mistrial when the jury allegedly saw respondent's wife help him up from a supine position on a courtroom bench; (10) in overruling appellant's objection to testimony about appellant's depression; (11) in overruling appellant's objection to respondent's closing argument which allegedly improperly injected the issue of punitive damages; and (12) in overruling appellant's motion for a new trial because the jury's verdict was allegedly excessive.

Respondent Robert Dickerson at the time of trial was a thirty-four year old man with a wife and two young sons. Before the accident in question, he enjoyed a normal relationship with his wife, who described her husband as a relatively happy man. In addition respondent had also enjoyed such family activities as camping, hiking, fishing, and watching his sons play baseball.

In 1972, at the age of 24, respondent began working as a railroad policeman for appellant. A railroad policeman performs basically the same function for the railroad as a municipal police officer performs for his city or county. In particular, railroad policemen inspect railroad cars for possible theft, vandalism, damage, or burglary. Appellant employed respondent at the Valley Junction railroad yard in East St. Louis, Illinois.

On December 11, 1978 at 7:35 p.m. a train known as CRBY 6014 rolled into Valley Junction. The train had two engines and one hundred cars. Respondent hopped onto the forty-third car from the rear in order to inspect its cargo of Cadillac automobiles. As he was climbing from the first, or A, level to

the second, or B, level of the railroad car, he slipped and fell to the ground, landing on his back on the ballast rock below. Respondent maintains that the train moved while he was attempting to climb from one level to the next.

Respondent injured his lower back as a result of the fall. Respondent has been hospitalized several times and undergone several operations on his back since his fall, but he is nonetheless in constant pain and cannot lie down, sit or stand for extended periods of time. Respondent can no longer enjoy the outdoor activities in which he used to participate with his family, such as hiking, camping, fishing, water skiing, working around his farm and going to ball games. His personnal relationship with his wife has deteriorated. Respondent, although once a happy man, is now irritable, depressed and unhappy.

In addition, respondent's evidence showed that he was totally and permanently disabled. Appellant produced the testimony of one physician who indicated that appellant could perform a sedentary job, but this physician could not name any one specific job for which respondent was suited.

Appellant also produced evidence which tended to show that respondent had injured his back before the fall from the railroad car, but respondent testified that he was in good health prior to the accident and shortly before his fall had completed a training course for appellant in Oakland, California which involved rigorous physical exercise. He earned a grade of A in this course and graduated with honors.

Respondent predicated his theory that appellant negligently failed to provide reasonably safe conditions or methods of work on three grounds. First, appellant was negligent for failing to give railroad policemen the protection of its "blue flag" rule. According to the evidence, whenever a workman is working on a train, he places a blue flag or signal at each end of the train and removes it when he is finished. The train may not move until the blue flag is removed and only the workman who put the

blue flag down may remove it. The blue flag rule did not apply to railroad policemen because, according to the railroad, requiring the policemen to put down a blue flag would hamper their ability to apprehend thieves and vandals on the trains.

Second, respondent alleged that appellant was negligent in forbidding radio communications between the train crew and the railroad policemen. Respondent testified that, although he was equipped with a radio so that he could listen to transmissions between the railyard operator and the conductor and engineer, the railroad forbade him to notify the conductor or engineer that he was on the train. Appellant produced testimony that, although communication between railroad police officers and the train's crew was not required, there was no rule forbidding such communication.

Third, respondent maintained that there was insufficient clearance between the treads of the ladder which led from one level of the railroad car to the next and the side of the car. The clearance was between two and two and a half inches wide and according to respondent did not provide enough toe room for a worker climbing the ladder. Appellant relied on the federal government's minimum standards, which the steps met, as evidence of no negligence.

After hearing the evidence, the jury awarded respondent $1,000,000.

Appellant first contends that the trial court erred in allowing evidence regarding the blue flag rule because respondent did not plead the blue flag rule as a theory of recovery, thereby surprising appellant at trial. The contention has no merit.

Respondent's first amended petition alleges that appellant "failed to provide reasonably safe methods of work." The pattern instruction for FELA cases, MAI 24.01, sets forth the employer's failure to provide reasonably safe methods of work as one dereliction from which the jury may infer the employer's

negligence. Thus, respondent pleaded the ultimate fact in issue and the pleading thus states one basis for liability. See *Fish v. Fish,* 307 S.W.2d 46, 51 (Mo. App. 1957). That appellant did not give its policemen the protection of the blue flag rule is arguably a failure to provide a reasonably safe method of work.

Although respondent pleaded an ultimate fact, the allegation is a broad generalization. Appellant could have learned more detailed facts by filing a motion for a more definite statement. As a matter of fact, the railroad itself pleaded as an affirmative defense that "Plaintiff inspected the cars of the train without being certain that the train was blue flagged."

The legal file contains a minute entry indicating that appellant filed a motion for more definite statement which was overruled; neither the motion nor the trial court's ruling, however, has been made a part of the record on appeal. Nor has appellant contended the trial court erred in overruling the motion.

This court is confined to the record as presented to it, see *Williams v. Clean Coverall Supply Co., Inc.,* 613 S.W.2d 659, 664[10] (Mo. App. 1980), and will not speculate as to the contents of motions not filed as part of the record. Any contention, if there ever was one, that appellant was entitled to a more definite statement, has been waived. See *State ex rel. State Highway Commission v. City of St. Louis,* 575 S.W.2d 712, 724[17,18] (Mo. App. 1978). Any indefiniteness in the amended petition was cured by the jury's verdict. See *Moschale v. Mock,* 591 S.W.2d 415, 418[4,5] (Mo. App. 1979).

Appellant next asserts the trial court erred in refusing to submit to the jury a present value instruction.[1] The Missouri

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INSTRUCTION NO. G

[1] If you find in favor of Plaintiff and decide to make an award for any loss of earnings in the future, you must take into account the fact that the money awarded by you is being received all at one time instead of over a period of time extending into the future and that Plaintiff will have the use of this money in a lump sum. You must, therefore, determine the present value or present worth of the money which you award for such future loss.

Supreme Court has held that " . . . a present value instruction was not appropriate under MAI." *Bair v. St. Louis - Francisco* [sic] *Ry. Co.*, 647 S.W.2d 507, 510[2] (Mo. banc 1983); but cf. *Chesapeake & Ohio Railway Co. v. Kelly*, 241 U.S. 485, 36 S.Ct. 630, 60 L. Ed. 1117 (1916) (on writ of error to the Court of Appeals of Kentucky, the U.S. Supreme Court reversed and remanded the case because of the trial court's refusal to give a requested present value instruction). The point is denied.

Appellant's third contention is that the trial court erred in denying appellant a new trial when respondent's counsel argued to the jury that respondent's future wage loss could be calculated by increasing respondent's salary by 5% per year and by multiplying respondent's annual salary by the number of his employable years. After the remarks by respondent's counsel, appellant's counsel objected. The objections were sustained. No further relief was requested. This court will not fault the trial court for failing to sua sponte grant a mistrial. See *Griffith v. St. Louis - San Francisco R. Co.*, 559 S.W.2d 278, 281[5] (Mo. App. 1977). The third point is denied.

Appellant's fourth point relied on is that the trial court erred in submitting the damage instruction, Instruction No. 9, which was MAI 8.02 modified.[2] Appellant argues that the instruction is inapplicable here because the evidence did not disclose a dispute between the parties about which one of several events actually caused respondent's injury and because the instruction assumes that respondent indeed fell on December 11, 1978.

INSTRUCTION NO. 9

[2] If you find the issues in favor of plaintiff, then you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe he sustained and is reasonably certain to sustain in the future as a result of the fall on December 11, 1978 mentioned in the evidence. Any award you make is not subject to income tax.

If you find plaintiff contributorily negligent as submitted in Instruction Number 8, then you must diminish the sum in proportion to the amount of the negligence attributable to plaintiff.

Appellant adduced evidence which tended to show that respondent's injury was caused to some extent by accidents other than the fall on December 11, 1978. Where there is a dispute in the evidence as to which of more than one event caused the plaintiff's injury, then MAI 8.02 should be modified to confine the jury's consideration of damages to the event asserted by the plaintiff as the basis for the defendant's liability. See *Russell v. Terminal Railroad Ass'n of St. Louis*, 501 S.W.2d 843, 847[2] (Mo. banc 1973); MAI 8.02, Notes on Use, Note 2.

Appellant's argument that the damage instruction erroneously assumes that respondent fell on December 11, 1978, is also unpersuasive. To hold that the modification of MAI 8.02 assumes a fact in issue would be tantamount to holding that the Notes on Use to that instruction were inapplicable and erroneous, because Note on Use 2 requires the specification of the date of the incident for which the railroad is responsible in all cases where more than one event is claimed to be the cause of the claimant's injury. The Notes on Use to the MAI must be followed where applicable. *Weinbauer v. Berberich*, 610 S.W.2d 674, 680[11] (Mo. App. 1980). The point is not well taken.

Appellant's fifth point contends the trial court erred in giving the jury Instruction 9 because the instruction allows the jury to speculate as to damages. Instruction 9 is an approved MAI instruction. This court is powerless to declare the submission of an applicable MAI instruction erroneous. Rule 70.02(b). Appellant's fifth point is denied.

Appellant argues next that the submission of MAI 8.02 deprives it of equal protection of the laws as guaranteed by the federal and state constitutions because wrongful death FELA defendants get the benefit of having the jury consider only pain and suffering *directly* resulting from the injuries of the decedent, MAI 8.01, whereas personal injury FELA defendants do not get the benefit of the word directly. The instruction is the

applicable MAI instruction. "This instruction [MAI 8.02] is mandatory to the exclusion of all others under the MAI." *Bair v. St. Louis - San Francisco Ry. Co.*, 647 S.W.2d 507, 510[3] (Mo. banc 1983). Point six is denied. Rule 70.02(b).

The seventh point is that the trial court erred in refusing to give the jury a speculative damage instruction.[3] The instruction is not in MAI. The Missouri Supreme Court has held that a non-MAI speculative damage instruction should not be given. *Bair v. St. Louis - San Francisco Ry. Co.*, 647 S.W.2d at 510[4]. Point seven is denied.

INSTRUCTION No. H

[3] You are not permitted to award the Plaintiff speculative damages by which term is meant compensation for future detriment which, although possible, is remote, conjectural or speculative. You can only award for future detriment if a preponderance of the evidence shows such a degree of probability of that detriment occurring as amounts to a reasonable certainty that it will result from the original injury in question.

In its eighth point, appellant alleges trial court error in the giving of Instruction 6,[4] because the instruction gives the jury a roving commission, i.e., the verdict director does not focus the jury's attention on any particular act or acts of negligence. The verdict director is the applicable instruction, MAI 24.01. Its use in the present case was mandatory. Rule 70.02(b). Moreover,

INSTRUCTION No. 6

[4] Your verdict must be for plaintiff if you believe:

First, defendant either failed to provide:
reasonably safe conditions for work, or
reasonably safe methods of work, and

Second, defendant in any one or more of the respects submitted in Paragraph First was negligent, and

Third, such negligence resulted in whole or in part in injury to Plaintiff.

the Missouri Supreme Court has rejected the "roving commission" argument. *Dunn v. St. Louis - San Francisco Ry. Co.*, 621 S.W.2d 245, 254-255 (Mo. banc 1981). Point eight is also denied.

Appellant next argues that the trial court erred in denying appellant's motion for a mistrial when the jury saw respondent's wife helping him up from a supine position on a courtroom bench. The point is denied for two reasons.

First, the record is devoid of any indication that the jury actually saw the incident of which appellant complains, other than the bare statement of appellant's trial counsel.

Second, whether to grant a mistrial is a matter within the sound discretion of the trial court. *Hoene v. Associated Dry Goods Corp.*, 487 S.W.2d 479, 485[11] (Mo. 1972). Here, no abuse of discretion has been shown.

The trial court was in a better position than this court to observe the effect which the alleged incident had on the jury, even assuming that it took place. Moreover, the jury had already been told during testimony that respondent needed to lie down on occasion in order to relieve the pain in his back. This court has read *Fitzpatrick v. St. Louis-San Francisco Railway Company*, 327 S.W.2d 801 (Mo. 1959), upon which appellant relies, and determines that the case is distinguishable on its facts. Point nine is denied.

Appellant next maintains that the trial court erred in overruling appellant's objections to testimony by respondent and his wife concerning respondent's depression.

Respondent testified that he was depressed because he could no longer play with his children, because his wife had to work to support the family and because he had heard that he was permanently disabled. There was also testimony that respondent feels depressed because he can no longer work on his farm and because he no longer has a normal relationship with his wife.

Appellant argues that this testimony is irrelevant because it related to the wife's loss of consortium, which is not compensable under FELA, and is too remote from damages properly recoverable for pain and suffering.

The parties agree that loss of consortium may not be recovered in an FELA action. Respondent, however, maintains that the testimony of which appellant complains is relevant to establish his pain and suffering from the December 11, 1978 fall.

The first issue is whether an FELA personal injury claimant may recover damages for emotional or mental after affects of an injury otherwise compensable under FELA. In *Adams v. Atchison, Topeka and Santa Fe Ry. Co.*, 280 S.W.2d 84, 94 (Mo. 1955), the court, in an FELA case, approved an instruction which permitted the jury to consider "such physical pain and mental suffering" as it found the plaintiff would endure in the future. Although the instrucon was not challenged on the ground that mental suffering was not compensable and the court accordingly did not address the issue under consideration here, the fact that the instruction was approved may be taken as implicit permission to recover damages for mental suffering. At the very least, *Adams v. Atchison, T. & S.F. Ry. Co.*, does not support the idea that mental anguish is not compensable.

Federal case law expressly approves the recovery of damages for mental suffering in an FELA case. In *Hayes v. New York Central Railroad Co.*, 311 F.2d 198 (2d Cir. 1962) the court discussed the issue of whether the plaintiff, a frostbite victim who had to have his feet amputated, could recover damages for emotional distress. The court held that " . . . the jury could . . . consider in its computation of damages the fear and anxiety which plaintiff experienced in knowing of the ever-present threat of amputation." 311 F.2d at 201[5,6].

The trial court in *Igsett v. Seaboard Coast Line Railroad Co.*, 332 F. Supp. 1127 (D.S.C. 1971) expressly awarded the FELA plaintiff damages for mental suffering:

> In addition to his physical pain and suffering he has suffered mental anguish, and anxiety, the shame of being transposed from an able-bodied, self-respecting working man to a pitiable, legless dependent, disfigurement, loss of sex life, humiliation and emotional strains attendant to such a deplorable condition, which would entitle him, if living, to compensation for his loss of happiness, normal life and composure. This court feels it appropriate that the award for the disability per se should include the non-pecuniary, non-pain aspects of the disabled condition, such as deprivation of a normal, full life and a chance to pursue non-economic hobbies or recreation. The court feels that an award of Fifteen Thousand ($15,000.00) Dollars is a fair and adequate amount as compensatory damages therefor.

332 F. Supp. at 1143[18].

Damages for mental suffering are recoverable in an FELA action. The next question is whether appellant [sic] adduced sufficient evidence to justify a finding by the jury that appellant's [sic] depression was caused by the December 11, 1978 fall. An FELA claimant can recover damages for mental distress only where there is competent evidence that the mental distress is attributable to the accident in question. See *Bullard v. Central Vermont Ry.*, 565 F.2d 193, 197[3] (1st Cir. 1977).

Medical testimony supports respondent's claim that his mental depression was caused by the December 11, 1978 accident. Dr. Michael Murphy, who treated respondent and testified by deposition, stated that he referred respondent to a psychiatrist because respondent was depressed and because the doctor wanted to keep respondent off narcotics. The doctor then gave his opinion on the cause of respondent's depression. "He's depressed because of his pain and his inability to work and support his family."

Dr. Robert E. Schultz, Dr. Murphy's partner and another physician who treated respondent, opined that respondent was depressed because of chronic pain and his inability to work and support his family. The physician employed by appellant admitted that respondent's chronic pain, plus his inability to engage in the "normal things in life" could contribute to his depression. Point ten is denied.

Appellant next argues that the trial court erroneously overruled appellant's objection to respondent's closing argument because the argument allegedly improperly injected punitive damages into the case. Point eleven is not well taken.

Appellant asserts that the error occurred during the following portions of respondent's closing argument:

> [MR. RITTER]
> And what you do here today when you bring that verdict form back down to the judge and he reads it is going to be heard by the railroad all of the way out to San Francisco.
>
> [MR. MORRIS]
> Object to this argument, Your Honor. This is a punitive damage - that is an argument about punitive [damages] and I object to it.
>
> [THE COURT]
> No. Overruled.
>
> [MR. RITTER]
> It is going to be heard by this railroad all of the way out to the home office in San Francisco, and I ask you to make it for an amount that's proven by the evidence that we've talked about that they'll hear about loud and clear for all times.
>
> ***
>
> But I ask you to make it as generous as you possibly can and let them know when you come back down here, "Mr. Railroad, we have done our job. Here is the price tag."

***

" . . . [T]he trial court is vested with a broad discretion in ruling on the propriety of jury arguments and determining whether prejudice has resulted." *S.G. Payne & Co. v. Nowak,* 465 S.W.2d 17, 20[5,6] (Mo. App. 1971). No abuse of discretion occurred. The argument does not expressly request the jury to punish appellant. Moreover, appellant expressly limited his request for damages to an amount proven by the evidence.

Appellant relies on *Smith v. Courter,* 531 S.W.2d 743 (Mo. banc 1976) where the court held that the plaintiff's closing argument improperly injected the issue of punitive damages. Although respondent walked dangerously close to the precipice of reversible error, he managed not to fall off the cliff. In *Smith v. Courter,* the plaintiff expressly referred to the deterrent effect which the verdict might have on others. 513 S.W.2d at 745. Here, respondent limited his arguments to appellant whose corporate headquarters are in San Francisco.

Moreover, in *Smith v. Courter,* the court acknowledges that on a cold record, it might be debatable whether the plaintiff was injecting the question of punitive damages. 531 S.W.2d at 746. Because the trial court had viewed the plaintiff's argument as exhorting the jury to consider deterrence as a factor, the reviewing court deferred to its determination. 531 S.W.2d at 747. Conversely, while it may be debatable whether plaintiff here made an improper plea for punitive damages, the trial court determined that the argument was not objectionable, and this court cannot say that the trial court abused its discretion in making that determination.

In its last point relied on appellant contends that the verdict was grossly excessive. This court has reviewed the record and determined that the evidence of respondent's lost wages, medical expenses, and pain and suffering adequately support the $1,000,000 verdict.

The judgment is affirmed.

ROBERT O. SNYDER, Judge

JOSEPH G. STEWART, Judge — Concurs

JOHN J. KELLY, JR., Presiding Judge — Concurs

APPENDIX B

No. 66229

IN THE SUPREME COURT OF MISSOURI
No. ED 46998

September Session, 1984

Robert Wayne Dickerson,
Plaintiff-Respondent,

vs.

St. Louis Southwestern Railway Company,
Defendant-Appellant.

TRANSFER

Now at this day, on consideration of Defendant-Appellant's Application to transfer the above entitled cause from the Eastern District Court of Appeals, it is ordered that said application be, and the same is hereby denied.

STATE OF MISSOURI—SCT.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September Session thereof, 1984, and on the 11th day of September 1984, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson City, this 11th day of September, 1984.

/s/ Thomas F. Simon, Clerk.

APPENDIX C

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

TO: ATTORNEYS OF RECORD

FROM: JAMES A ROCHE, JR., Clerk

DATE: JULY 12, 1984

Please be advised that the following Motions For Rehearing and/or Transfer to the Supreme Court have been DENIED as of July 12, 1984:

44356	Karen S. Williams vs. Venture Stores, Inc.
44705	Louis Szombathy vs. Ferguson Florissant School District
45822	State of Missouri vs. Willie Thomas
45834	State of Missouri vs. Larry Dewayne Usher
46131	Sandra L. Pinky vs. Dr. Michael Winer
46506	Estate of Gilford Willard, Melba Peters, et al. vs. State of Missouri
46636	Marlowe Powell vs. Norman Lines, Inc.
46680	Kralik vs. Mortgage Syndicate, Inc.
46761	State of Missouri vs. Craig Arnold
46894	State of Missouri vs. Ronald Richardson
46938	Susan Feinberg vs. Daniel Feinberg
46984	Walls vs. Walls
46998	Dickerson vs. St. Louis Southwestern R.R.
47010	A. T. Knopf vs. Harlow Richardson, et al.
47036	Lonnie Leigh vs. State of Missouri
47042	Andrew Frank, et al. vs. Environmental Sanitation, et al.
47099	State of Missouri vs. Eddie P. Waselewski
47147	Donna Frye vs. Meramec Marine, Inc.
47158	David O. Battle vs. State of Missouri
47235	Lippman, et al. vs. Desloge, et al.

47236	State of Missouri vs. Earl P. Inman
47297	State of Missouri vs. Darnell Duckett
47303	Jefferson Gravois Bank vs. E. J. Cunningham, J.
47331	Lois Rucker vs. Ballwin Fire Protection
47347	State of Missouri vs. Larry Edmisten
47357	Lisa Ford, a Minor, et al. vs. Goffstein Realty, et al.
47369	State of Missouri vs. Burt Rodgers
473?2	Cunningham vs. Cunningham
47486	State of Missouri vs. Stephen Mitchell
47531	State of Missouri vs. Walter Robinson, Jr.
47611	State Tax Comm. of Mo. vs. Oberjuerge Rubber Co.
47632	Wm. Richardson vs. St. John's Mercy Hosp.
47649	Tibbie Zuker Horvath, et al. vs. City of Richmond Hts., et al.
47838	State of Missouri vs. Charles E. Martin
47881	John Reid vs. City of Maplewood, Mo.

JAR:kd

APPENDIX D

Rule 70.02. Instructions to Juries.

* * *

(b) Missouri Approved Instructions Exclude Others. Whenever Missouri Approved Instructions contains an instruction applicable in a particular case which the appropriate party requests or the court decides to submit, such instruction shall be given to the exclusion of any other on the same subject.

* * *

Rule 70.03. Objections to Instructions

Counsel need not object to any instructions to be given at the request of any other party or by the court on its own motion or to the refusal of any instruction requested by such party. Specific objections to instructions shall be required in motions for new trial unless made at trial. The making of objections during trial shall not preclude making additional objections to the same or other instructions in the motion for new trial. No general objection to instruction is required.

APPENDIX E

IN THE CIRCUIT COURT OF MISSOURI
TWENTY-SECOND JUDICIAL CIRCUIT
DIVISION NO. 8

CAUSE NO. 812-00914

Honorable Ivan Lee Holt, Judge

Robert Wayne Dickerson,
Plaintiff,

vs.

St. Louis Southwestern Railway Company,
Defendant.

Transcript on Appeal, Volume 2, pages 722-725

INSTRUCTION CONFERENCE

[722] (The following proceedings took place in the Judge's chambers:)

THE COURT: Gentlemen, in addition to the instruction which I've already read to the jury, I intend to read to the jury as instruction No. 2 given by the Court MAI 2.03. As Instruction No. 3 given by the Court MAI 2.02. As Instruction No. 4 offered by the plaintiff MAI 11.02.

MR. RITTER: Is that definition of negligence?

THE COURT: Yes. As Instruction No. 5 given by the Court MAI 3.01.

MR. MORRIS: Is that burden of proof?

THE COURT: Yes. As Instruction No. 6 offered by the plaintiff MAI 24.01 modified. As Instruction No. 7 offered by the defendant MAI 33.03(2). As Instruction No. 8 offered by the defendant MAI 32.07 modified. As Instruction 9 offered by the plaintiff MAI 8.02 modified.

[723] MR MORRIS: That's damages?

THE COURT: Yes. As Instruction No. 10 given by the Court MAI 2.04.

Now, Mr. Ritter, do you care to make any record on the Instructions?

MR. RITTER: You said 2.04, Judge, was the last one?

THE COURT: Yes, that's the nine of your number.

MR. RITTER: Judge, I'd like the record to show please that Instruction No. 5 is given by agreement of the parties as the burden of proof. Correct, Mr. Morris?

MR. MORRIS: So stipulated.

THE COURT: All right.

MR. RITTER: May the record show, Your Honor, that plaintiff, prior to your indicating which instruction you were going to read, offered MAI—mark these, A, B and C.

THE COURT: Which—oh, yes. A. is assumption of risk. B. is a damage instruction, C. is a damage instruction, both of which are erroneous, and so is D.

MR. RITTER: May the record show that plaintiff has offered Instructions A, B, C and D, and that those were refused by the Court?

THE COURT: Yes. Are you objecting to my refusal?

MR. RITTER: Yes, sir.

THE COURT: Okay. All right, Mr. Morris, do you care to make any record on the Instructions?

[724] MR. MORRIS: Your Honor —

THE COURT: Off the record.

(Discussion was had off the record.)

MR. MORRIS: Let the record show that on behalf of the defendant, that the defendant objects to the giving of instructions tendered by the plaintiff with the exception of Instruction No. 5, I believe that was, which has been agreed to—

THE COURT: All right.

MR. MORRIS: — on behalf of the plaintiff. And further, the defendant objects to the action of the Court in refusing defendant's tendered instructions lettered E. through H.

THE COURT: Very well. Those objections will be overruled. As to the refused Instruction A, the Court is of the opinion that assumption of risk is not in the case and that the instruction should not be given. As to B, Instructions B and C, they're refused because they make no mention of contributory negligence diminishing the damages, and therefore are erroneous since contributory negligence is being given. As to Instruction No. D, the Court is giving a damage instruction, Instruction No. 9, which is more accurate than refused Instruction D, in that it includes, "After the fall on December the 11th," the words mentioned in the evidence which is the proper way to give it under MAI. As to instructions, defendant's refused Instructions E through H, none of them are in MAI, and they are refused for that reason and because they're simply lectures to the jury and add nothing of any merit to the issues to instruct on.

* * *

APPENDIX F

INSTRUCTION G

If you find in favor of Plaintiff and decide to make an award for any loss of earnings in the future, you must take into account the fact that the money awarded by you is being received all at one time instead of over a period of time extending into the future and that Plaintiff will have the use of this money in a lump sum. You must, therefore, determine the present value or present worth of the money which you award for such future loss.

APPENDIX G

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

Cause No.
Division No. 812-09941

MOTION OF DEFENDANT ST. LOUIS SOUTHWESTERN RAILWAY COMPANY FOR JUDGMENT IN ACCORDANCE WITH ITS MOTION FOR A DIRECTED VERDICT AT THE CLOSE OF ALL THE EVIDENCE, OR, IN THE ALTERNATIVE, FOR A NEW TRIAL

Comes now Defendant, St. Louis Southwestern Railway Company, and, for its Motion for Judgment on its Motion for Directed Verdict at the Close of All the Evidence previously filed, or, in the Alternative, for a New Trial, states as follows:

* * *

10. The Court prejudicially erred in refusing the following instructions tendered by Defendant because said instructions are legal, valid instructions stating Defendant's rights under the Federal Employer's Liability Act and the federal common law pertaining thereto:

a. Instruction G, the present value instruction.

Said instruction is particularly important because of Plaintiff's young age, his intent to work until age 65 or 70, and the very great future wage loss in view of the evidence that his current salary would be over $29,000.00 per year if he were still working.

* * *

12. Instruction No. 9. Plaintiff's damage instruction was erroneously given by the Court to the prejudice of Defendant in that said instruction uses the language "fall on December 11, 1978." By use of the word "fall" said instruction assumed as

true Plaintiff's evidence that he did, in fact, fall as he claimed in his testimony. Further, by use of the words "mentioned in the evidence" the instruction directs the jury that the fall occurred for the reasons claimed by Plaintiff, namely, that the train moved, a hotly disputed issue.

Further, said instruction erroneously omits the word direct, or some other limiting word or phrase such as "in whole or in part," in the phrase "as a result of the occurrence." The federal common law pertaining thereto and the Federal Employers' Liability Act do not permit indirect or remote damages from Defendant's negligence. They provide that the Defendant shall be liable in *damages* for *injury* resulting in whole or in part from the negligence of the railroad. In short, Instruction No. 9 and M.A.I. 8.02 are clear misstatements of the law permitting the jury to find Defendant liable for indirect, remote, speculative and conjectural damages.

This instruction is limited by the M.A.I. Notes on Use, thus by Supreme Court Rule, to Federal Employers' Liability Act cases and, hence, is discriminatory against Federal Employers' Liability Act defendants. In compelling the use of said instruction, the Supreme Court of Missouri has deprived Defendant of its rights under the equal protection of laws provision of the United States Constitution, Fourteenth Amendment, and Missouri Constitution, Article I, Section 2, and has deprived Defendant of its property without due process of law in violation of Defendant's rights under the Missouri Constitution, Article I, Section 10, and has denied Defendant its rights under the Federal Employers' Liability Act, 45 U.S.C.A., Sections 51, *et seq.*, in that Defendant is liable in damages only for injury (or death) resulting in whole or in part from its negligence, in violation of Defendant's rights under Article 6, Clause 2 of the United States Constitution.

* * *

26. The Court prejudicially erred in overruling Defendant's objection thereto and permitting the Plaintiff's counsel to argue

that the Plaintiff's lost wage in the future is equal to the number of years Plaintiff has testified that he intended to work times his current wage rate. Said figure was calculated by Plaintiff's counsel to be approximately $1 million dollars. Said argument is contrary to the law pertaining to FELA cases established by the United States' Courts in that it fails to reduce the Plaintiff's claim for future wage loss to its present value. Under federal law, loss of wages in the future under an FELA claim must be reduced to present value.

* * *

28. The verdict was excessive and against the rule of uniformity. Said verdict was excessive by the sum of $700,000.00 and the Court should enter a remittitur in the amount of $700,000.00.

29. The verdict was excessive, so excessive as to be the result of passion and prejudice and can only be corrected by action of the Court in setting aside the judgment and remanding the case for a new trial.

* * *

APPENDIX H

IN THE CIRCUIT COURT
CITY OF ST. LOUIS

Filed March 4, 1983

Clerk, Circuit Court

Robert W. Dickerson,
Plaintiff

vs.

St. Louis Southwestern Railway Company,
Defendant

No. 812-09941 March 4, 1983

MEMORANDUM FOR CLERK

Motion of Defendant for Judgment in Accordance with its Motion for a Directed Verdict at the Close of all the Evidence, or, in the Alternative, for a New Trial both denied.

/s/ I. L. Holt, Jr., Judge

cc: Clerk
Court
Mr. Ritter
Mr. Morris

APPENDIX I

POINTS RELIED ON BEFORE
THE MISSOURI COURT OF APPEALS

II

The Trial Court Erroneously Refused To Submit A Present Value Instruction To The Jury Because An Award To Plaintiff Not Reduced To Its Present Value Or Worth Is Prejudicially Inflated In That Every FELA Defendant Has A Fixed, Substantive Federal Right To Have The Jury Reduce The Award To Plaintiff To Its Present Value Or Present Worth.

IV

The Trial Court Erred In Submitting To The Jury Plaintiff's Instruction No. 9, The Damage Instruction [M.A.I. 8.02], Because It Should Not Have Been Modified To Describe The Compensable Event As Plaintiff's "Fall On December 11, 1978, Mentioned In The Evidence," In That Paragraph 2, Notes On Use For M.A.I. 8.02 States That Such Modification Should Be Made Only When And If A Defendant Is Claiming That A Different Event Caused Plaintiff's Injury And Here Defendant Did Not Claim Or Attempt To Show That Another Event Caused Plaintiff's Alleged Injuries, And Furthermore, Defendant Was Prejudiced Because The Instruction Assumed As True Plaintiff's Evidence That He Did In Fact Fall And It Directed The Jury That The Fall Occurred For The Reasons Claimed By Plaintiff.

VI

The Trial Court Erred In Overruling Defendant's Motion For New Trial, Paragraph 12, To The Effect That Instruction No. 9 [The Damages Instruction - M.A.I. 8.02] Deprived Defendant Of Equal Protection Under The Law Under The United States Constitution And The Missouri Constitution

Because M.A.I. Fails To Distinguish Between Or Classify Wrongful Death FELA Defendants And Personal Injury FELA Defendants On A Rational And Reasonable Basis In That M.A.I. 8.02 [Here Instruction No. 9] Does Not Require That Plaintiff's Damages Result Directly Or Proximately From Plaintiff's Injury Whereas M.A.I. 8.01 (The Damages Instruction For Wrongful Death) Requires That Plaintiff's Damages Be Directly Or Proximately Caused By Plaintiff's Injury.

XII

The Trial Court Erroneously Overruled Defendant's Motion For New Trial, Paragraphs 28 And 29, To The Effect That The One Million Dollar Verdict Was Excessive Because It Was Without Support Of The Record And Due To An Impassioned And Inflamed Jury In That Much Improper Evidence On Damages Was Admitted Into Evidence And That The Jury Was Subjected To Plaintiff's Sympathy-Provoking Scenarios.

IN THE MISSOURI SUPREME COURT

No. 66229

Robert Wayne Dickerson,
Plaintiff-Respondent

vs.

St. Louis Southwestern Railway Company
Defendant-Appellant,

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY'S APPLICATION FOR TRANSFER AFTER OPINION BY THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT

COMES NOW appellant, St. Louis Southwestern Railway Company and for its Application for Transfer for the Missouri Court of Appeals, Eastern District, to the Missouri Supreme Court, pursuant to Rule 83.03 states:

* * *

3. Appellant now asserts the following grounds for transfer:

* * *

(b) The Court of Appeals affirmance of the trial court's refusal of appellant's present value instruction to the jury is a question of general interest and importance. (Slip Op. at 5.)

* * *

(d) The Court of Appeals' Opinion affirming the use of MAI 8.02 and MAI 8.01 despite the denial of due process to personal injury FELA defendants due to the distinction in the causal language in those instructions (8.01 requires no "direct" link between injury and damage whereas 8.02 does) illustrates the need for clarification of law in this area.

* * *

(f) The Court of Appeals' Opinion raises a question of general interest and importance in that it affirmed an excessive verdict in the amount of $1,000,000, when the evidence did not warrant this and where plaintiff's counsel made impermissible closing argument despite repeated warnings by the trial court, (Slip Op. at 12-13). This is a case where plaintiff was not paralyzed nor even immobilized, but his claim involves only a very bad result from a lumbar ruptured disc and his inability to work because of that poor result.

APPENDIX J

8.02 Damages - F.E.L.A. - Injury to Employee

* * *

Committee's Comment (1978 New)

This instruction is used only in an F.E.L.A. case wherein the employee sustained injury. It is a duplication of MAI 4.01 with two exceptions. The word "direct" is deleted from the fifth line of MAI 4.01. This is required in an F.E.L.A. case so that the instruction complies with the correct substantive law, *Wilmoth v. Rock Island Ry.*, 486 S.W.2d 631 (Mo. 1972); *Crane v. Cedar Rapids & Iowa City Ry. Co.*, 395 U.S. 314 (1969); and *Rogers v. Mo. Pac. Ry.*, 352 U.S. 500 (1957).

APPENDIX K

Rule 83.03. Transfer by Supreme Court After Opinion by Court of Appeals

In any Case in which a motion for rehearing has been overruled and an application for transfer under rule 83.02 has been denied, the case may be transferred by order of this court on application of a party for any of the reasons specified in rule 83.02, or for the reason that the opinion filed is contrary to a previous decision of an appellate court of this state. Application for such transfer shall be filed in this court within 15 days of the date on which transfer was denied by the court of appeals. Motions for reconsideration of the court's action in refusing an application for transfer shall not be accepted or filed.

APPENDIX L

[738] THE COURT: I assume that's what he did.

MR. RITTER: Yes, sir.

MR. MORRIS: That's all he's proven. Now, I object that there is no evidence for these mathematical calculations and projections. I don't know where they came from. I don't know how he arrived at them. Likewise, I object that any of these type of damages have to be, under the federal F.E.L.A. law, reduced to present value. There has to be expert testimony if he's going to do these kinds of projections.

THE COURT: No, I don't think so, if he's taking the expectancy and the wages that he was making I think he can argue that. Overruled.

MR. RITTER: Thank you, Your Honor.

MR. MORRIS: How about the projections, Your Honor, **[739]** the other, the projections as to the millions of dollars? He's got two million, three million dollars down there. I'd like for him to tell us what he is going to argue before he does so I can make a record.

THE COURT: I understood from what he said he took the years' expectancy times the wages.

MR. MORRIS: That's not the two-million-dollar figure.

MR. RITTER: Judge, there are two sets of figures. One is the future expectancy based upon his earnings today to age sixty-five and age seventy. The other set of figures assumes a five percent wage increase, which the evidence has shown through Mr. Miskell the men had been receiving at least a five percent increase per year over the years that he's worked there, and that creates evidence from which the jury can believe that would continue.

MR. MORRIS: I object to that, Your Honor.

THE COURT: No, I don't think that because—

MR. MORRIS: It requires expert testimony.

MR. RITTER: That's why I put the evidence in, Judge.

MR. MORRIS: That requires expert testimony, Your Honor. There is no possible way—

MR. RITTER: Judge, Mr. Miskell was listed as the expert on that. I read his disposition and he testified.

MR. MORRIS: He is no economic expert. All he did was tell about the past wages, Your Honor.

[740] THE COURT: Yes. I don't think you can argue that there would be a five percent increase every year for the rest of his expectancy. I think that's speculative.

MR. RITTER: Judge, I'm not going to argue that there is going to be a five percent wage increase. All I would like to argue and propose to argue is that the evidence has shown that he did have a five percent increase for all the years that he was there, at least five percent.

THE COURT: Well, I think you can argue that because it's shown that, but I don't think you can take that and multiply it out.

MR. RITTER: If the—

MR. MORRIS: I object to that, Your Honor.

THE COURT: Yes, and I'll sustain it to that portion of it.

(The proceedings returned to open Court.)

MR. MORRIS: I object to the use of the board if those other figures are on there.

THE COURT: All right. He says he's not going to use them.

MR. RITTER: Ladies and gentlemen, if the man is disabled, based upon what he was earning when they laid him off and canceled all of his rights, if he continued to earn the wage rate as of March, 1981, throughout his working life to age sixty-five, now this is a large figure, but if you take **[741]** anybody's wages and multiply it out during the time that they have left to work it's going to be a large figure; to age sixty-five this man would have earned $902,620. To age seventy, which they're entitled to work to now under the new federal law, he would have earned $1,051,420. Those figures assume that he would have had no raises at all for the next thirty-four years.

Now, if he had—the evidence showed from Mr. Miskell that their wages were going up five percent a year at least over the years Mr. Dickerson worked there. And I think you can see that if you assume he would continue to have had those raises, if he was able—

MR. MORRIS: Wait a minute, Your Honor. I'm going to object to that. This gets into the area of speculation.

MR. RITTER: Just mentioning a figure, Your Honor.

THE COURT: All right, sustained.

MR. RITTER: That that figure would be very large, very large indeed. I'm not allowed to multiply it out for you. 1.05 times—

MR. MORRIS: Object to that, Your Honor.

THE COURT: Sustained.

MR. RITTER: Now—

MR. MORRIS: Ask that it be stricken.

MR. RITTER: That's a million dollars if he never got a raise. Obviously far more if they got raises. Now, it's up **[742]** to the jury to find how much more that would have been. Now, that's

what they have taken out of his pocket. And the evidence has shown that he's now cut off, no more rights, no pension, no retirement, nothing. No insurance, no medical payment, nothing. It's all on him for the rest of his life. Now, that's well over a million dollars right there, and you can figure out how much it would be if he would have gotten the raises.

* * *

No. A-232

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ST. LOUIS SOUTHWESTERN RAILWAY CO.,
Petitioner,

vs.

ROBERT WAYNE DICKERSON,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS EASTERN DISTRICT

GRAY & RITTER
ROBERT F. RITTER, P.C.
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QUESTIONS PRESENTED FOR REVIEW

I. THE MISSOURI COURT OF APPEALS IN *DICKERSON V. ST. LOUIS SOUTHWESTERN RAILWAY COMPANY*, 674 S.W.2d 165 (MO. APP. 1984), DID NOT ERR IN AFFIRMING THE TRIAL COURT'S REFUSAL OF PETITIONER'S TENDERED "PRESENT VALUE" INSTRUCTION BECAUSE SAID INSTRUCTION IS NOT INCLUDED IN MISSOURI APPROVED INSTRUCTIONS AND STATE COURTS ARE TO FOLLOW STATE PRACTICE AND PROCEDURE IN F.E.L.A. CASES.

II. THE MISSOURI COURT OF APPEALS IN *DICKERSON V. ST. LOUIS SOUTHWESTERN RAILWAY COMPANY*, 674 S.W.2d 165, (MO.APP. 1984), DID NOT ERR IN AFFIRMING THE TRIAL COURT'S GIVING OF MISSOURI APPROVED INSTRUCTION 8.02 BECAUSE STATE COURTS ARE TO FOLLOW STATE PRACTICE AND PROCEDURE IN F.E.L.A. CASES AND SAID INSTRUCTION DID NOT INFRINGE UPON PETITIONER'S SUBSTANTIVE RIGHTS NOR DENY IT EQUAL PROTECTION.

III. THE MISSOURI COURT OF APPEALS IN *DICKERSON V. ST. LOUIS SOUTHWESTERN RAILWAY COMPANY*, 674 S.W.2d 165 (MO.APP. 1984) DID NOT ERR IN AFFIRMING THE TRIAL COURT'S ACCEPTANCE OF THE JURY VERDICT; DID NOT ERR IN CONCLUDING PETITIONER HAD NOT REQUESTED RELIEF IN THE TRIAL COURT BASED ON RESPONDENT'S COUNSEL'S ALLEGED IMPROPER ARGUMENT; AND DID NOT ERR IN AFFIRMING THE TRIAL COURT'S REFUSAL OF A "PRESENT VALUE" INSTRUCTION THAT IS NOT INCLUDED IN MISSOURI APPROVED INSTRUCTIONS.

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No. A-232

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ST. LOUIS SOUTHWESTERN RAILWAY CO.,
Petitioner,

vs.

ROBERT WAYNE DICKERSON,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS EASTERN DISTRICT

JURISDICTIONAL STATEMENT

In its petition for writ of certiorari, petitioner St. Louis Southwestern Railway Company has not properly invoked the jurisdiction of the United States Supreme Court. The petition states, "This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3)." Petitioner then states, "The questions presented involve the invalidity and unconstitutionality of certain pattern, mandatory jury instruction (sic) promulgated by the Missouri Supreme Court (Missouri Approved Instructions)[1] for FELA cases and a resultant excessive verdict in the Court of Appeals' decision in this case because it is contrary to the decisions of this Court and the Federal Courts of Appeal." (Footnote omitted.)

Petitioner's stated reasons to invoke the jurisdiction of this Court do not fall within any of the requirements of jurisdiction pursuant to 28 U.S.C. §1257(3): "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:...(3) by Writ of Certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity especially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

Petitioner has not drawn into question the validity of a treaty or statute of the United States. Petitioner has not drawn into question the validity of a State statute on the grounds of its being repugnant to the Constitution, treaties or laws of the United States. Petitioner had not shown where any title, right, privilege or immunity especially set up or claimed under the Constitution, treaties or statutes, of, or commission held or authority exercised under, the United States, has been infringed.

Petitioner purports to invoke the jurisdiction of this Court because it claims the Missouri Court of Appeals' decision in this case is contrary to the decisions of this Court and the federal courts of appeal. Whereas a state court opinion in conflict with applicable decisions of this Court or a federal court of appeals could be a consideration governing review on certiorari pursuant to Supreme Court Rule 17, it does not invoke the jurisdiction of this Court. Based on its Jurisdictional Statement, petitioner has failed to invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1257(3). In addition, petitioner has failed to comply with Supreme Court Rule 21 requiring a concise statement of the grounds on which jurisdiction of this Court is invoked.

If this Court has jurisdiction over petitioner's claims, the Court should decline to exercise that jurisdiction because petitioner's Questions for Review were not timely raised in the state trial court and are not properly before this Court. A constitutional question not raised in state court proceedings is not open in proceedings on petition for certiorari. *Ellis v. Dixon,* 349 U.S. 458, 75 S.Ct. 850, *rehearing denied* 350 U.S. 855, 76 S.Ct.37 (1955). The Supreme Court will not decide claims "not pressed or passed upon" in state court. *Illinois v. Gates,* 103 S.Ct. 2317, 2321-2322 (1983), *citing McGoldrick v. Compagnie Generale,* 309 U.S. 430, 435-436, 60 S.Ct. 670, 673 (1940) and *State Farm Mutual Automobile Insurance Company v. Duel,* 324 U.S. 154, 160, 65 S.Ct. 573, 576 (1945).

Petitioner's Question for Review I claims the Missouri Court of Appeals prejudicially erred in sustaining the trial court's refusal of a "present value" instruction tendered by petitioner. The giving of such an instruction to the jury by the court would not have been supported by the evidence. Petitioner presented no evidence whatsoever as to the present worth of the future lost earnings sustained by respondent. Petitioner did not offer any expert testimony concerning predicted future rates of inflation, the interest rate that appropriately could be used to discount future earnings to present value, or the possible connection between inflation rates and interest rates. Petitioner cannot now be heard to complain that it was deprived of a substantive right when it was given ample opportunity to present evidence. Not only did petitioner fail to present evidence as to present value, it made no offer of proof of the evidence that it could have presented to the trial court.

In addition, petitioner did not preserve its objection nor raise the federal issue it now is claiming. At the instruction conference in the trial court, the court refused petitioner's tendered instructions E through H. Instruction G was the "present value" instruction. (Instruction E stated the defendant was not an insurer of the safety of employees; Instruction F stated

defendant cannot be held liable because there may be a safer method of performing the work in question and Instruction H dealt with speculative damages.) Petitioner objected to the action of the court in refusing defendant's tendered instructions lettered E through H. Beyond this general objection, petitioner did not single out its objection to Instruction G nor raise the issue it is now raising that a "present value" instruction is required in all F.E.L.A. cases as a matter of federal law.

Petitioner's Question for Review II also raises an issue that was not presented in the state court below. Petitioner now claims it was denied equal protection under the law because the trial court submitted M.A.I. 8.02, the Missouri Approved Instruction for damages in personal injury F.E.L.A. cases. Petitioner did not tender a different damages instruction to the court. (See Petitioner's Appendix E, Instruction Conference.)

Although Missouri Supreme Court Rules do not require objection to instructions during an instruction conference, on appeal the Missouri Supreme Court will consider the failure to raise an issue during trial or to request a modification of an instruction. *See Hudson v. Carr,* 668 S.W.2d 68, 71-72 (Mo. en banc 1984) and *Fowler v. Park Corporation,* 673 S.W.2d 749 (Mo. en banc 1984). In *Fowler,* the Missouri Supreme Court described counsel's failure to object at the instruction conference as "sandbagging." *Id.* at 756. The Missouri Supreme Court will reverse only for "defects of substance with substantial potential for prejudicial effects." *Id.* Failure to raise the issue during trial or to request a modification is considered in determining whether an instruction is prejudicial. *Hudson,* 668 S.W.2d at 71-72.

In *Fowler,* the Missouri Supreme Court noted there has been a trend in recent years away from reversal for error in instructions unless there is a "substantial indication of prejudice." *Fowler,* 673 S.W.2d at 757. The court stated "lawyers take a chance in deliberate silence in the face of error..." *Id.* The court

in *Fowler* found the complaining party had waived his objections. Petitioner herein also waived its objections by failing to tender what it would consider to be the proper damages instruction.

Petitioner first raised its objection to the damages instruction in its Motion for New Trial. Petitioner did not, however, raise its present equal protection claim that defendants in personal injury actions under the F.E.L.A. are discriminated against irrationally and on an unreasonable basis when compared with other Missouri personal injury defendants and defendants in F.E.L.A. actions for wrongful death. Petitioner cannot now be heard to complain of the constitutional ramifications of such alleged classification. Petitioner did not raise the constitutional question at its first opportunity in the trial court and did not renew it in its Motion for New Trial and, therefore, is barred from raising the constitutional question to this Court.

Petitioner's Question for Review III also wholly fails to invoke the jurisdiction of this Court. That question alleges the Missouri Court of Appeals erred in affirming a One Million Dollar ($1,000,000) jury award as not excessive because the evidence did not warrant an award of such magnitude and because respondent's counsel made an impermissible closing argument. Petitioner also claims the trial court erred in refusing to submit a present value instruction to the jury. The alleged excessiveness of a jury verdict and a counsel's closing arguments are not federal statutory or constitutional issues and do not invoke the jurisdiction of the United States Supreme Court pursuant to 28 U.S.C. §1257(3). Petitioner's argument regarding the "present value" instruction is merely a repeat of its Question for Review II. Question for Review II is not properly before this Court, and repeating that question in Question III will not bring the various issues of Question III before this Court. On Page 5 of its Petition, petitioner states, "The Excessive One Million Dollar Verdict In This Case Resulted From Erroneous Missouri Approved Instruction System." This issue as framed

was not presented to the Missouri courts either at trial or on appeal. Petitioner refers the Court to its Motion for New Trial. (Petitioner's Appendix G, Paragraphs 28, 29). Those paragraphs claimed the verdict was excessive and against the rule of uniformity and was so excessive as to be the result of passion and prejudice. Petitioner made that same claim on appeal to the Missouri Court of Appeals. (Petitioner's Appendix I, Points Relied On Before The Missouri Court Of Appeals). These points clearly do not raise petitioner's present contention that the alleged excessive verdict was based on erroneous instructions. Petitioner did not timely raise Question for Review III in state court and cannot now raise that issue before this Court.

In summary, this Honorable Court should decline to exercise its jurisdiction over the petition for writ of certiorari because petitioner's Questions for Review I, II and III were not timely raised in the state trial court and are not properly before this Court.

STATEMENT OF THE CASE

Pursuant to Supreme Court Rule 34(3), respondent makes the following additions to petitioner's Statement of the Case. Respondent cites to the trial court transcript.

Respondent Robert Wayne Dickerson was first employed by petitioner as a railroad policeman in 1972. (T. 115). His job duties included inspecting railway cars containing Cadillac automobiles when they arrived at the Airport Crossing just outside East St. Louis, Illinois. (TR. 122-124). In 1978, Mr. Dickerson was promoted from a policeman to a special agent, but his job duties remained basically the same. (TR. 119). The special agents were to inspect the Cadillacs because of vandalism occurring to the cars during shipment. (TR. 125, 126). During his inspections, respondent was equipped with a radio, but was not allowed by instruction of petitioner to contact the train crew to inform them he was on the train. (TR. 134, 372,

301, 302). The conductor, who gives the order for the train to move, would have no way of knowing whether a special agent was on the train inspecting or doing other work. (TR. 495-496). This method of work for agents was department policy. (TR. 138). The only way respondent would know the train was about to leave was by hearing the conversation between the conductor and engineer on his radio. (TR. 142). There were times when he would not hear the signal given by the conductor to the engineer because none was given or because of noise in the area, (TR. 143, 489) or because the radios were not working, (TR. 143, 489) or because there were no radios on the engine, (TR. 143) or because the call would go out on a different frequency than respondent's radio. (TR. 491, 492). He was not allowed to delay the train to complete his inspections. (TR. 140).

When a train stopped near the Airport Crossing, carmen were required to inspect it. (TR. 136). While the carmen or others were inspecting the train, they would place a "blue flag" or a "blue light" in front of the engine and behind the caboose. (TR. 136-139). While the "blue flag" was present, no one was allowed to move the train. (TR. 136-137, 497). Due to department policy, special agents were not allowed to place "blue flags" or "blue lights" in front of the train. (TR. 138, 301, 302, 303, 497).

On December 11, 1978, respondent was working the second shift, which started at 3:00 P.M. and concluded at 11:00 P.M. (TR. 126). He was the only special agent working that particular shift on that day. (TR. 126). Mr. Dickerson's hand-held radio was working. (TR. 145). It was shortly after 7:30 P.M. and it was dark and cold. (TR. 144). He was inspecting car no. SSW80869 on a train that contained approximately 100 cars. The car in question was approximately the 43rd car from the rear of the train (TR. 148) and 58th or 59th from the front. (TR. 149). There was noise in the area from the motors of refrigeration cars on the adjacent track. (TR. 151). While respondent was stretched around the door in a "frog like" position attemp-

ting to get on the ladder, (TR. 153) the train unexpectedly moved, causing him to lose his grip and footing and fall to the ballast rock on the ground. (TR. 154) He fell onto his buttocks and low back. (TR. 155). He had no notice that the movement was about to occur (TR. 180) and there was no radio transmission regarding any such movement. (TR. 180). The crew did not know he was on the train (TR. 494) and had no way of knowing under the method followed by the railroad. (TR. 494-496). There was no fixed time period that the train would remain stopped prior to its moving (TR. 222) so respondent would not have any set time to know that the train would move out. (TR. 496-497). It was common knowledge of individuals who worked on the railway cars that the toe room on the ladders was insufficient (TR. 139, 306) and this contributed to respondent's fall. (TR. 139, 153, 154).

As a result of his fall, Mr. Dickerson sustained severe, permanent and disabling injuries and damages. He has had four (4) painful surgeries, fourteen (14) hospitalizations, numerous trips to emergency rooms, physical therapy sessions and multiple injections to this back. (TR. 337-342, 163-172, Schultz depo, 32-64, Murphy depo, 11-50)

Respondent has been totally disabled from working since March 1981. (TR. 174). He is depressed because of the pain and his inability to work and support his family (TR. 174, 251; Murphy depo, 45; Schultz depo, 68-69) and has received psychiatric care. (Murphy depo, 55).

Respondent had lost earnings in the amount of $63,180 through December 21, 1982 (TR. 187). As of January of 1982 he would have been earning $2, 486 per month (or, $29,832 per year). Following December 31, 1982, at the age of 34 (TR. 112), respondent would have had a work life expectancy of 36 more years, to age 70. Therefore, at the time of trial, he had a future wage loss, assuming no raises or benefits, of $1,055,952 (36 years x $29,832 per year). When added to the past loss, the total lost wages are $1,119,132. There was evidence that those in Bob Dickerson's position had received raises of at least 5% per year, on average. (TR. 415).

REASONS FOR DENYING THE WRIT

I. The Missouri Court Of Appeals In *Dickerson v. St. Louis Southwestern Railway Company*, 674 S.W.2d 165 (Mo.App. 1984), Did Not Err In Affirming The Trial Court's Refusal Of Petitioner's Tendered "Present Value" Instruction Because Said Instruction Is Not Included In Missouri Approved Instructions And State Courts Are To Follow State Practice And Procedure In F.E.L.A. Cases.

As stated in his Jurisdictional Statement, it is respondent's position that petitioner has not invoked the jurisdiction of this Court. Petitioner's Question for Review I is not properly before this Court because petitioner made no offer of proof and introduced no evidence as to present value to support the instruction it now claims it was prejudicially denied by the trial court. In addition, petitioner failed to object to the denial of the instruction.

If this Honorable Court should decide petitioner's Point I is within its jurisdiction, then it is respectfully submitted the point is not one that merits the exercise of the Court's discretion to grant a writ of certiorari. Pursuant to Supreme Court Rule 17, "review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only where there are special and important reasons therefor." The character of reasons that will be considered are: "...(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals." or "(c) when a state court or federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court."

There are no special or important reasons for the Court to consider petitioner's Question for Review I. The Missouri Court of Appeals has not decided a federal question in a way in

conflict with another state court, a federal court of appeals or this Court. Petitioner has raised a procedural question that has been resolved by Missouri courts in a way consistent with the decisions of this Court. This Court has denied petitions for writ of certiorari based on this exact argument by petitioner's counsel on previous occasions. *Dunn v. St. Louis-San Francisco Railway Company,* 621 S.W.2d 245 (Mo. en banc 1981) *cert. denied sub. nom-Burlington Northern v. Dunn,* 454 U.S. 1145, 102 S.Ct. 1007 (1982) and *Bair v. St. Louis-San Francisco Railway Company,* 647 S.W.2d 507 (Mo. en banc) *cert. denied sub. nom - Burlington Northern Inc. v. Bair,* ____ U.S. ____, 104 S.Ct. 107, 52 U.S.L.W. 3263 (1983).

While respondent recognizes the denial of certiorari is not a decision on the merits, *State of Maryland v. Baltimore Radio Show,* 338 U.S. 912, 70 S.Ct. 252 (1950), it is significant that this Court repeatedly has denied petitions for writ of certiorari based on the exact same issues raised herein. Certainly, petitioner's claim is not of the substantial character warranting the exercise of this Court's discretion pursuant to Supreme Court Rule 17. The repeated raising of the same issues by petitioner's counsel to this Court can only be regarded as a delay tactic.

Petitioner's Question for Review I does not raise a federal question of substance, but rather one of procedure that has been decided in a way in accord with the decisions of this Court. It is well-established that while state courts are without power to detract from substantive rights granted by Congress in F.E.L.A. cases, they are free to follow their own rules of practice and procedure. *Brown v. Western Railway of Alabama,* 338 U.S. 294, 296, 70 S.Ct. 105, 106 (1949). It is recognized that state rules of practice and procedure govern the necessity, form and effect of instructions to the jury. 79 ALR 2d 572-575 and cases cited therein. *See also Later Case Service,* 79 ALR 2d 553-587 and cases cited therein.

In Missouri, the Supreme Court promulgates mandatory pattern jury instructions. The court is aided by a committee. In

F.E.L.A. cases, Missouri courts have adhered to the general M.A.I. Plan of Instruction, which seeks to simplify and balance the instruction process. *Bair,* 647 S.W.2d at 510.

Petitioner has claimed the trial court erred in refusing to submit Instruction No. G tendered by petitioner. The instruction is not included in M.A.I. and was as follows:

> If you find in favor of plaintiff and decide to make an award for any loss of earnings in the future, you must take into account the fact that the money awarded by you is being received all at one time instead of over a period of time extending into the future and that plaintiff will have the use of this money in a lump sum. You must, therefore, determine the present value or present worth of the money which you award for such future loss. (Petitioner's Appendix F.)

The propriety of giving such a "present value" instruction was considered by the Missouri Supreme Court in *Dunn v. St. Louis-San Francisco Railway Company,* 621 S.W.2d at 253. In upholding the trial court's refusal to submit an instruction identical to the one tendered by petitioner in this case, the court noted the M.A.I. Damage Instruction adequately explains the law regarding damages. The court also stated, "Any further explanation of the M.A.I. Damage Instruction by the tendered Instruction E is not acceptable procedure under M.A.I." (Cite omitted) *Id.*

In *Dunn,* the court went on to say the refusal to give the proffered instruction did not violate federal rights: "There is no compelling reason to limit application of the general rule that the form of the instructions and the manner in which the substantive law is submitted to the jury in an F.E.L.A. case are procedural matters governed by state law. *Rogers v. Thompson,* 308 S.W.2d 688 (Mo. 1958)." *Id.*

In *Bair,* 647 S.W.2d at 510, the Missouri Supreme Court affirmed the *Dunn* decision and stated, "there are instructions

which are abstractly correct in law which are commonly given in some jurisdictions, but which are not included in the M.A.I. Plan. The absence of an instruction does not prevent counsel from introducing evidence or making argument."

In the present case, petitioner did argue to the jury the present value of damages, but chose not to introduce any evidence whatsoever as to the present worth of the future lost earnings. Petitioner did not offer any expert testimony concerning predicted future rates of inflation, the interest rate that appropriately could be used to discount future earnings to present value, or the possible connection between inflation rates and interest rates. Absent such evidence, the jurors were left with no method to calculate the so-called "present value" of respondent's future earnings. Petitioner now claims it was deprived of substantive rights, although it was given ample opportunity to present evidence and to make closing argument on this issue.

Contrary to the arguments made by petitioner, there is no mandate from the United States Supreme Court that a present value instruction must be given in all cases involving future wage losses. In the most recent United States Supreme Court decision to touch on this subject, *Jones & Laughlin Steel Corporation v. Pfeifer,* ____ U.S. ____, 103 S.Ct. 2541 (1983), the Court noted the trial court is left with several options in determining whether it wishes to give a "present value instruction" or whether to assume that the rate of inflation and the interest rate of the money received for future lost earnings were equal and, therefore, requiring no specific "present value" instruction. In that case, the matter was left to the trial court's discretion.

Both *Chesapeake & Ohio Railway Company v. Kelly,* 241 U.S. 485, 36 S.Ct. 630 (1916) and *Jones & Laughlin,* relied on by petitioner, involved the elements of a proper "present value" instruction, but did not mandate that such an instruction be given in a F.E.L.A. case. In *Jones & Laughlin,* the Court reversed a decision by the district court, which in performing its

damages calculations, erred in applying the theory of a decision of the Pennsylvania Supreme Court as a mandatory federal rule of decision. That decision had held "as a matter of law that future inflation shall be presumed equal to future interest rates with these factors offsetting." 103 S.Ct. at 2544. In *Jones & Laughlin,* the Supreme Court discussed in detail various approaches as to present value instructions. The Court was urged to "select one of the many rules that had been proposed and establish it for all time as the exclusive method in all federal trials for calculating an award for lost earnings in an inflationary economy." *Id.* at 2555. The Court declined to do so.

Beanland v. Chicago, Rock Island and Pacific Railroad Company, 480 F.2d 109 (8th Cir. 1973) and *Sleeman v. Chesapeake & Ohio Railway Company,* 414 F.2d 305 (6th Cir. 1969), were cases brought in federal district court. It is well-established that federal practice and procedure would apply. Instructions are considered procedural matters. *Beanland* and *Sleeman* differ from the present case, in which the action was brought in state court and Missouri rules of practice and procedure apply. In *Beanland,* the trial court had failed to give an instruction proffered by the defendant that is set forth in E. Devitt & C. Blackmar, *Federal Jury Practice & Instructions* §78.13 at 205-206 (1970). *Beanland,* 480 F.2d at 115.

Although it may be error for a federal district court to decline to give an instruction accepted in federal practice, it is not error for a state court to decline to give the same instruction when it is not accepted by state practice and procedure. Petitioner's claim the Missouri Court of Appeals prejudicially erred in following established Missouri instruction practice by refusing the "present value" instruction tendered by petitioner is without merit.

In summary, the Court should deny the petition for writ of certiorari based on Question for Review I because:

1. Said question is not properly before this Court because petitioner made no offer of proof and introduced no evidence as

to "present value," and failed to object to the refusal of the instruction.

2. Said Question does not merit the exercise of this Court's discretion to grant a writ of certiorari because the Court has denied petitions based on this exact argument by petitioner's counsel on previous occasions.

3. Said Question does not raise a federal question of substance, but rather one of procedure that has been decided by Missouri courts in accord with the decisions of this Court.

II. The Missouri Court Of Appeals In *Dickerson v. St. Louis Southwestern Railway Company,* 674 S.W.2d 165, (Mo.App. 1984), Did Not Err In Affirming The Trial Court's Giving Of Missouri Approved Instruction 8.02 Because State Courts Are To Follow State Practice And Procedure In F.E.L.A. Cases And Said Instruction Did Not Infringe Upon Petitioner's Substantive Rights Nor Deny It Equal Protection.

As stated in the Jurisdictional Statement, it is respondent's position that petitioner has not invoked the jurisdiction of this Court. Petitioner's Question for Review II is not properly before this Court because petitioner did not tender a different damages instruction to the court and did not raise its constitutional claim at its earliest opportunity in the trial court.

The same reasons set out in respondent's Reason for Denying the Writ I herein are also applicable to Reason II. Petitioner's question is not one that merits the exercise of this Court's discretion to grant a writ of certiorari and does not meet the requirements of Supreme Court Rule 17. This Honorable Court has denied petitions for writ of certiorari based on this exact same argument by petitioner's counsel on previous occasions. *Bair v. St. Louis San Francisco Railway Company,* 647 S.W.2d 507 (Mo. en banc) *cert. denied sub. nom - Burlington Northern Inc. v. Bair,* ____ U.S. ____, 104 S.Ct. 107, 52 U.S.L.W. 3263 (1983). The raising of the same issue to this Court can only be regarded as a means of delaying the payment of the judgment.

As with Question for Review I, Question II raises an issue that is governed by state procedure. It is recognized that state rules of practice and procedure govern the necessity, form and effect of instructions to the jury. 79 ALR 2d 572-575 and cases cited therein.

The trial court in the present case followed the established Missouri procedure and gave M.A.I. 8.02, the damages instruction for F.E.L.A. personal injury cases, which states:

> If you find the issues in favor of plaintiff, then you must award plaintiff such sums as you believe will fairly and justly compensate plaintiff for any damages you believe he sustained and is reasonably certain to sustain in the future *as a result* of the fall on December 11, 1978, mentioned in the evidence. Any award you make is not subject to income tax.
>
> If you find plaintiff contributorily negligent as submitted in Instruction No. 8, then you must diminish the sum in proportion to the amount of the negligence attributable to plaintiff. (emphasis added). (Legal File, Instruction No. 9).

Petitioner claims the word "direct" should have been inserted before "result" to read "as a *direct* result." Petitioner's position is wholly inconsistent with federal law. Missouri's approved instruction adequately and fully sets forth the substantive federal law.

The Missouri Supreme Court in *Bair v. St. Louis-San Francisco Railway Company,* held M.A.I. 8.02 is the proper damages instruction to be given in F.E.L.A. personal injury actions. The word "direct" is deleted before "result of the occurrence" to comply with F.E.L.A. substantive law. M.A.I. 8.02, Committee's Comment (1981 Revision), citing *Wilmoth v. Chicago, Rock Island and Pacific Railroad Company,* 486 S.W.2d 631 (Mo. 1972); *Crane v. Cedar Rapids & Iowa City Ry.*

Co., 395 U.S. 164, 89 S.Ct. 1706 (1969) and *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 77 S.Ct. 443 (1957).

In *Rogers v. Missouri Pacific Railroad Company*, the United States Supreme Court held the test in an F.E.L.A. case is "simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Rogers*, 352 U.S. at 506, 77 S.Ct. at 448.

Missouri Approved Instruction 8.02 is consistent with federal substantive law. Petitioner's contention is inconsistent with the wording of 45 U.S.C. §51 (1939), which states in pertinent part: "Every common carrier by railroad...shall be liable...for such injury or death resulting *in whole or in part* from the negligence of any of the officers, agents, or employees of such carrier..." (emphasis added). The statute reads "in whole or in part," not as a "direct result," as now argued by petitioner. A railroad may be held liable for damages sustained as "a result" of its conduct, no matter how slight. Petitioner's claim the damages must be "a direct result" is inconsistent with federal case law and the wording of the statute itself.

The Missouri trial court correctly followed established Missouri instruction practice in giving M.A.I. 8.02. Petitioner did not tender a different instruction and its present contention it was denied equal protection under the law is without merit.

III. The Missouri Court Of Appeals In *Dickerson v. St. Louis Southwestern Railway Company*, 674 S.W.2d 165 (Mo.App. 1984) Did Not Err In Affirming The Trial Court's Acceptance Of The Jury Verdict; Did Not Err In Concluding Petitioner Had Not Requested Relief In The Trial Court Based On Respondent's Counsel's Alleged Improper Argument; And Did Not Err In Affirming The Trial Court's Refusal Of A "Present Value" Instruction That Is Not Included In Missouri Approved Instructions.

In its Question for Review I, petitioner herein has argued the trial court erred in failing to submit a "present value" instruction. Petitioner repeats that same claim in its Question for Review III. For the reasons respondent discussed in Reasons for Denying Writ I, a "present value" instruction was not required. For the first time, petitioner now claims the failure to give the "present value" instruction was a "major factor" leading to an excessive verdict. Petitioner did not make this claim in its Motion for New Trial nor in its points on appeal to the Missouri Court of Appeals.

On appeal to the Missouri Court of Appeals, petitioner contended the verdict was excessive as a result of an "impassioned and inflamed jury." (Petitioner's Appendix I, Points Relied On Before The Missouri Court of Appeals). In *Dickerson v. St. Louis Southwestern Railway Company*, 674 S.W.2d 165, 173 (Mo.App. 1984) (Petitioner's Appendix A), the court found:

> In its last point relied on, appellant contends that the verdict was grossly excessive. This court has reviewed the record and determined that the evidence of respondent's lost wages, medical expenses and pain and suffering adequately support the One Million Dollar verdict.

Petitioner's arguments overlook the finding of the Missouri Court of Appeals that the verdict includes damages for "pain and suffering." *Id.* The jury award was not based solely on respondent's loss of future earnings. Bob Dickerson had endured years of pain before trial and the evidence showed he would continue to suffer in the future. The verdict was not excessive. The Missouri Court of Appeals reviewed the evidence and found:

> Respondent has been hospitalized several times and undergone several operations on his back since the fall, but he is nonetheless in constant pain and cannot lie down, sit or stand for extended periods of time. Respondent can no longer enjoy the outdoor activities in which he used to par-

> ticipate with his family, such as hiking, camping, fishing, water skiing, working around his farm and going to ballgames. His personal relationship with his wife has deteriorated. Respondent, although once a happy man, is now irritable, depressed and unhappy.
>
> In addition, respondent's evidence showed that he was totally and permanently disabled. Appellant produced the testimony of one physician who indicated that appellant could perform a sedentary job, but this physician could not name any one specific job for which respondent was suited. *Dickerson,* 674 S.W.2d at 168.

It is well-established that state rules govern with respect to the reviewability of questions of the excessiveness of damages and with respect to remittitur practices. 79 ALR 568-569. *Louisville & N.R. Co. v. Holloway,* 246 U.S. 525, 38 S.Ct. 379 (1918). The question of excessiveness of a verdict is a non-federal question and one, therefore, that has been decisively determined by the Missouri courts. *See also Rogers v. Thompson,* 308 S.W. 2d 688 (Mo. 1958).

Petitioner's claim that respondent's counsel made an impermissible argument also is a non-federal question and was resolved in *Dickerson,* 674 S.W.2d at 170. The court stated:

> Appellant's third contention is that the trial court erred in denying appellant a new trial when respondent's counsel argued to the jury that respondent's future wage lass could be calculated by increasing respondent's salary by 5% per year and by multiplying respondent's annual salary by the number of his employable years. After the remarks by respondent's counsel, appellant's counsel objected. The objections were sustained. No further relief was requested. This court will not fault the trial court for failing to *sua sponte* grant a mistrial. *See Griffith v. St. Louis-San Francisco Railway Company,* 559 S.W.2d 278, 281 [5] (Mo.App. 1977).

Petitioner's Question for Review III is without merit.

CONCLUSION

In summary, petitioner's writ of certiorari should be denied because:

1. Petitioner has not properly invoked the jurisdiction of the United States Supreme Court pursuant to 28 U.S.C. §1257(3).

2. Petitioner's Questions for Review were not timely raised in the state trial court and are not properly before this Court.

3. Petitioner's Questions for Review I and II do not merit the exercise of this Court's discretion to grant a writ of certiorari because the Court has denied petitions based on these exact same arguments by this same counsel now representing petitioner. *See Dunn v. St. Louis-San Francisco Railway Company,* 621 S.W.2d 245 (Mo. en banc 1981) *cert. denied sub. nom - Burlington Northern v. Dunn,* 454 U.S. 1145, 102 S.Ct. 1007 (1981) and *Bair v. St. Louis-San Francisco Railway Company,* 647 S.W.2d 507 (Mo. en banc) *cert. denied sub. nom - Burlington Northern Inc. v. Bair,* ____ U.S. ____, 104 S.Ct. 107, 52 U.S.L.W. 3263 (1983). The repeated raising of the same issues to the Court can only be regarded as a delay tactic.

4. Petitioner's Questions for Review I and II raise issues of procedure that are governed by State rules and practice. The trial court followed established Missouri instruction practice and said practice did not infringe upon petitioner's substantive rights under the F.E.L.A. or upon its guarantee to equal protection.

5. Petitioner's Question for Review III raises questions of the excessiveness of damages and the propriety of counsel's closing argument. Both issues are non-federal questions and have been decisively determined by the Missouri courts.

6. Any claims of error advanced by petitioner are harmless, insubstantial and immaterial. There has been no showing petitioner has been prejudiced by any of the trial court's alleged errors. All of petitioner's claims of error go to the issue of damages, and those damages are not excessive with or without the claimed errors. The evidence supports the conclusions of the trial court and of the Missouri Court of Appeals that the damages are not excessive based on respondent's medical expenses, lost earnings and past and future pain and suffering. Petitioner's claims have been considered and denied by the Missouri appellate courts. There is now no sound reason for this Court to consider the claims.

For the above reasons, respondent requests this Court to deny petitioner's Writ of Certiorari to the Missouri Court of Appeals, Eastern District. If this Court should find there has been error, respondent respectfully asks that the Court remand the case for trial as to damages only. Petitioner has not raised the issue of liability. All of petitioner's points of alleged error relate to damages.

Respectfully submitted,

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(3)

No. 84-914

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ST. LOUIS SOUTHWESTERN RAILWAY CO.,
Petitioner,

vs.

ROBERT WAYNE DICKERSON,
Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS EASTERN DISTRICT

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No. 84-914

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ST. LOUIS SOUTHWESTERN RAILWAY CO.,
Petitioner,

vs.

ROBERT WAYNE DICKERSON,
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In order to present its Reply Brief in the most concise and logical fashion, Petitioner will reply to each portion of Respondent's Brief in sequence.

JURISDICTIONAL STATEMENT

Respondent's assertion that Petitioner has failed to adequately state jurisdictional grounds is meritless. Petitioner has cited 28 U.S.C. §1257(3). That statute provides in part that this Court has jurisdiction to review "final judgments or decrees rendered by the highest court of a state . . . (3) By Writ of Certiorari, . . . where any title, [or] right . . . is specially set up or claimed under the Constitution . . . or statutes of . . . the United States." Moreover, Rule 17 of this Court's Rules of Appellate Practice states that this Court, in determining whether to issue a Writ of Certiorari, will consider: "(b) When a state court of last

resort has decided a federal question in a way in conflict with the decision . . . of a Federal Court of Appeals; (c) When a state court . . . has decided a federal question in a way in conflict with applicable decisions of this Court." Petitioner makes clear in its Jurisdictional Statement that it is claiming that certain instructions in the Missouri Approved Instruction system are denying it rights guaranteed by the United States Constitution and by the decision of this Court and the Federal Courts of Appeal. As stated, these assertions are sufficient to invoke this Court's jurisdiction. See *Seaboard Air Line Ry. v. Padgett,* 236 U.S. 668, 35 S.Ct. 481, 59 L.Ed. 777 (1915) (erroneous declaration of federal law by the highest court of a state constitutes grounds for issuing a Writ of Certiorari). Supreme Court Rule 21 requires *a concise statement* of the ground on which jurisdiction of the Court is invoked. The points made in the Jurisdictional Statement are amplified in the argument portion of the Petitioner's Brief in support of its Petition for Writ of Certiorari.

Consequently, Petitioner's Jurisdictional Statement is adequate to invoke the jurisdiction of this Court.

Although Respondent purports to follow more closely this Court's Rules of Appellate Practice, his Jurisdictional Statement is far from concise. It occupies more than five (5) pages of his twenty (20) page brief. After the first one and one-half pages of the Jurisdictional Statement, Respondent obviously indulges in arguing the merits of the case. (See Respondent's Brief pp. 3-6). Many of these arguments are repeated in Respondent's argument portion of his brief.

Respondent's assertion that the Questions for Review raised by Petitioner were not timely raised in the courts below is groundless. Moreover, the decisions of this Court cited by Respondent on this point, deal with situations where the point was raised for the first time in this Court and where no lower court had entertained or passed upon the issue. However, where the state court decides a question proper for this Court's jurisdiction, the Court can review the issue. *Illinois v. Gates,* 76

L.Ed.2d 527, 536, ____ S.Ct. ____ (1983); *McGoldrick v. Compagnie Generale Transatlantique,* 309 U.S. 430, 434, 60 S.Ct. 670 (1940). As will be shown below, and in addition to the illustration in Petitioner's Brief, the points were properly presented to all lower courts and the Missouri Court of Appeals ruled on all these points.

Respondent makes the general assertion of untimeliness and then fails to support it. He argues about sufficiency of evidence for the tendered (but refused) present value instruction. However, no evidence of present value is necessary; the jury can decide that issue for themselves. (See also *Duncan v. St. Louis-San Francisco Railway,* 480 F.2d 79, 87 (8th Cir. 1973), see also *infra,* pp. 7 - 8). Next, Respondent says "Petitioner did not preserve its objection nor raise the federal issue it is now claiming." (Respondent's Brief in Opposition at page 3.) Although Respondent never identifies what "federal issue" he refers to, Petitioner reminds the Court that in Paragraph 10(a) of its Motion for New Trial (See Appendix G of Petitioner's initial Brief), Petitioner objected to the trial court's failure to give the present value instruction it tendered as against "the defendant's rights under the FELA and the federal common law pertaining thereto."

Perhaps most importantly though, on the issue of whether this point of error was preserved for appellate review, is that the Eastern District Missouri Court of Appeals ruled on the trial court's refusal to give a present value instruction. *Dickerson v. St. Louis Southwestern Railway Co.,* 674 S.W.2d 165, 170 (Mo. App. 1984). In Missouri Appellate Courts, like every other jurisdiction, no review or ruling will be made on points of error the Appellate Courts finds are not properly raised and preserved. *E.g., Lincoln Credit Co. v. Peach,* 636 S.W.2d 31, 36 [12] (Mo. banc 1982). In ruling on this point the *Dickerson* court relied specifically on language in *Bair v. St. Louis-San Francisco Railway Co.,* 647 S.W.2d 507 (Mo. banc 1983), and stated: "the Missouri Supreme Court has held that '. . . a present value in-

struciton was not appropriate under M.A.I.' " *Dickerson v. St. Louis Southwestern Railway Co.,* 674 S.W.2d at 170. It is interesting to note that Respondent chose not to make this same argument regarding the alleged failure to preserve the issue for appellate review to the Missouri Court of Appeals in his brief there. Nevertheless, now that the Missouri Court of Appeals has held that the Missouri Supreme Court is correct that the M.A.I. system has no room for a present value instruction, it is an erroneous decision in conflict with the decisions of this Court (see Petitioner's initial Brief, Reasons for Granting the Writ, pp. 7-10 for authority and discussion).

Respondent also asserts that Petitioner failed to preserve for review its second Question Presented for review (involving M.A.I. 8.01 and M.A.I. 8.02). Before the Missouri Court of Appeals, Respondent claimed that Petitioner failed to adequately preserve this issue for appellate review. See Appendix M, hereto, which is pp. 35-36 of Respondent's Brief filed with the Missouri Court of Appeals. The Missouri Court of Appeals must have ruled that the point was preserved for review because it ruled on the point. See, *Dickerson v. St. Louis Southwestern Railway Co.,* 674 S.W.2d at 171 [11]. Again, the *Dickerson* court relied specifically on the Missouri Supreme Court and quoted its holding in *Bair v. St. Louis-San Francisco Railway Co.,* 647 S.W.2d, 507, 510 [3] (Mo. banc 1983): "This instruction [M.A.I. 8.02] is mandatory to the exclusion of all others under the M.A.I." *Dickerson v. St. Louis-San Francisco Railway Co.,* 674 S.W.2d at 171 [11].

Respondent then attempts to divert this Court's attention with a discourse on the Missouri Supreme Court's philosophy on when it will reverse cases for instructional error. For at least two reasons, Respondent's position is fatally flawed. First, Missouri Supreme Court Rule 70.03 provides that an objection to instructions is timely raised if made in the motion for new trial. *Hudson v. Carr,* 668 S.W.2d 68, 71, [5] (Mo. banc 1984). (See Appendix D, in Petitioner's initial Brief, where Rule 70.03

is set out.) This has always been the rule in the Missouri. Petitioner made its objection to the instruction in question in its Motion for New Trial. Respondent cannot contradict this nor does he attempt to. Secondly, Respondent attempts to use a recent Missouri Supreme Court case, *Fowler v. Park Corporation,* 673 S.W.2d 749 (Mo. banc 1984), to argue that any instructional error has been waived.

A reading of *Fowler* on the instant issues shows it is inapposite to this case. In *Fowler,* the trial court requested defense counsel to state on the record if he had any objections to the instructions. He replied that "he didn't see anything wrong with them, ..." *Fowler v. Park Corporation,* 673 S.W.2d at 756. Counsel also submitted converse instructions to the instruction (definition of negligence) challenged on appeal. *Id.* The two most crucial observations by the Missouri Supreme Court in *Fowler* were that counsel had not merely withheld an objection to the instructions offered by plaintiff and that if defendant counsel had offered the alternative definition of negligence, the trial court would have had the opportunity to correct the error and "undoubtedly" would have done so. *Fowler v. Park Corporation,* 673 S.W.2d at 756.

In the case at bar, Petitioner's counsel objected to the giving of M.A.I. 8.02 at the instructions conference and tendered an alternative instruction (see Appendix E, Petitioner's initial Brief, p. A-21, where the trial court refused Instruction D and Instruction H, offered by counsel for Petitioner) (see also *Dickerson v. St. Louis Southwestern Railway Co.,* 674 S.W.2d at 171, n. 3, where Instruction H is set out.)

The arguments made here with respect to *Fowler v. Park Corporation, supra,* are equally applicable to *Hudson v. Carr,* 668 S.W.2d 68 (Mo. banc 1984) also cited by Respondent. Counsel in *Hudson* also failed to make any objection to the instruction and failed to tender an alternative instruction. *Hudson v. Carr,* 668 S.W.2d at 71 [5]. That is certainly not the case here.

Respondent also claims that Petitioner's third Question Presented is not preserved for review. Petitioner did, in fact, argue to the Missouri Court of Appeals that the excessive verdict in this case resulted in great part because of improper jury instruction. In Point XII of its Argument to the Court of Appeals, Petitioner argued in part as follows:

> A major factor in this excessive verdict is that the jury was improperly instructed. Defendant illustrated earlier that *federal law mandates that the jury be instructed to reduce any award to present value.* Moreover, the verdict director (Instruction No. 6) and the damages instruction (Instruction No. 9) permitted the jury to speculate and to take into account matters beyond the proper scope of their consideration. (emphasis added)

(Petitioner's Appellant's Brief before the Missouri Court of Appeals, Eastern District, page 59.)

It is obvious that the issue of the present value instruction was raised to the Court of Appeals. That court did not hold that petitioner had failed to preserve the present value instruction aspect of this point, but rather ruled on the point as an entirety and must have held that the issue was properly preserved. *Dickerson v. St. Louis Southwestern Railway Co.,* 674 S.W.2d at 173 [19].

STATEMENT OF THE CASE

Petitioner does not intend to endorse or approve of Respondent's Statement of the Case by deciding not to reply to the same here. In the interest of devoting its time to what it considers more important issues for this Petition for Writ of Certiorari, Petitioner chooses not to reply to Respondent's Statement of the Case.

REASONS FOR ISSUING THE WRIT

I.

Despite Respondent's obvious desire to have the law be to the contrary, there is no doubt that an FELA defendant in a state court has a fixed federal right to have a present value instruction submitted to the jury. *Jones & Laughlin Steel Corp. v. Pfeiffer,* ____ U.S. ____, 76 L.Ed.2d 768, 103 S.Ct. 2541 (1983). In *Jones & Laughlin Steel Corp. v. Pfeiffer, supra,* this Court made clear that the legal measure of damages is that a person is entitled to be compensated for future lost wages "reduced to its present value". 76 L.Ed.2d at 780. This Court considered a variety of discounting methods or theories in *Jones & Laughlin Steel Corp. v. Pfeiffer,* but it never waivered from its long-held position that a lost wages award must be discounted.

As pointed out in Petitioner's initial Brief, the court gave renewed liability to *Chesapeake & Ohio Railway Co. v. Kelly,* 241 U.S. 45, 491, 36 S.Ct. 630, 60 L.Ed. 11117 (1916), where this Court held that an FELA defendant has a right as a matter of federal law to an instruction telling the jury that they are to award damages on the basis of present value or money value only. *Jones & Laughlin Steel Corp. v. Pfeiffer,* ____ U.S. ____, 76 L.Ed.2d at 783. (Petitioner's Brief at 7). Although certain of the theories resulted in "total offset" the Court never held that no discounting formula need be applied or considered. On the contrary, this Court reversed the case because no present value instruction had been given even though the petitioner had "insisted that if compensation was to be awarded it 'must be reduced to present value.' " *Jones & Laughlin Steel Corp. v. Pfeiffer,* 76 L.Ed.2d at 792.

Respondent asserts that Petitioner failed to preserve this issue because it did not offer any evidence of present value. Respondent has failed to cite any authority requiring that evidence of present value must be offered. No evidence or offer of proof need be introduced to support a present value instruction. *Dun-*

can v. St. Louis-San Francisco Railway Co., 480 F.2d 79, 87 (8th Cir. 1973) (no evidence of present value needed; jurors are presumed to be able to award only "money value"); *Chesapeake & Ohio Railway Co. v. Kelly,* 241 U.S. 45, 489-490, 36 S.Ct. 630, 632, 60 L.Ed. 1117 (1916) (court stated that "it is self-evident that a given sum of money in hand is worth more than a like sum payable in the future.") Furthermore, in December, 1982 when this case tried in the Circuit Court for the City of St. Louis, Missouri, the Missouri Supreme Court had by decision prohibited both present value argument and evidence of present value because they were beyond instructions given by the court. *Dunn v. St. Louis-San Francisco Railway Co.,* 621 S.W.2d 245, 254 (Mo. banc 1981). Therefore, counsel for Petitioner was prohibited by Missouri law at the time of trial of this case from arguing present value to the jury and from introducing any evidence of present value.

Contrary to Respondent's assertion, the denial of Petitions for Writ of Certiorari by this Court are not to be used as authority for his position. *Maryland v. Baltimore Radio Show, Inc.,* 338 U.S. 912, 94 L.Ed. 562, 70 S.Ct. 252 (1950). In *Maryland v. Baltimore Radio Show,* this Court made clear that the "sole significance of such denial of a Petition for Writ of Certiorari . . . simply means that fewer than four members of the court deemed it desirable to review a decision of the lower court as a matter 'of sound judicial discretion.' " 338 U.S. at 917. Consequently, "such a denial carries with it no implication whatever regarding the court's views on the merits of the case which it has declined to review." 338 U.S. at 919. Further, Respondent fails to even point out what prior cases there were and what issues they involved.

Respondent next attempts to confuse procedure with substantive law by claiming that the Missouri Approved Instruction system properly excludes the present value instruction because jury instructions are governed by state procedure. Respondent ignores that the issue here is one of federal law—damages in an

FELA case, a federal cause of action, capable of being brought in state court. Questions of measure of damages under the FELA are governed by federal law even if the action is brought in state court. *Norfolk & Western Railway Co. v. Liepelt,* 444 U.S. 490, 493, 100 S.Ct. 755, 62 L.Ed.2d 689, 693 (1980). Contrary to this, Respondent proposes that the legal measure of damages in an FELA case is different if the case is brought in state court than if the case is brought in federal court. There is no authority for this position, nor does Respondent cite any.

The point here is that Petitioner's *right* to have a present value instruction submitted to the jury is being thwarted by the Missouri Approved Instruction system which the Missouri Supreme Court has declared does not allow it to be given to the jury. *Bair v. St. Louis-San Francisco Ry. Co.,* 647 S.W.2d 507, 510 [3] (Mo. banc 1983). This is not a discussion over different ways of submitting the instruction for present value—it is one of whether the state of Missouri must give it through its own courts.

II.

In arguing that this Court should deny Petitioner's Petition for Writ of Certiorari, Respondent again ignores the well-recognized rule that denial of a Petition for Writ of Certiorari in the past is not precedenital authority for denying other Petitions for Writ of Certiorari that may raise similar issues. *State of Maryland v. Baltimore Radio Show,* 338 U.S. 912, 70 S.Ct. 252 (1950).

Respondent's attempt to justify the language of M.A.I. 8.02 under state and federal law fails. He argues that this instruction on damages should be governed by state procedure and state law, but neglects to point out that every other damages instruction in the Missouri Approved Instruction System requires a "*direct* result" between a plaintiff's damage and a defendant's conduct. (See Petitioner's Brief, pp. 10-15.) As petitioner points out in its initial Brief to this Court, it is anathema under

Missouri state law to have a damages instruction which does not require this direct causal link. (Petitioner's Brief at 13.) *Brown v. St. Louis Public Service Co.*, 421 S.W.2d 255, 257 (Mo. banc 1957).

The failure of M.A.I. 8.02 to have the word "direct" in its causal phrasing is heightened by the fact that the M.A.I. system provides no other damage instruction or information to be given to the jury on the issue of damages. For example, no instruction identifying or listing the proper elements of damages is permitted by the Missouri Approved Instructions. M.A.I. 8.02 is the exclusive and sole damages instruction given to a jury in an FELA personal injury case in a Missouri state court. This is especially crucial in a case such as this one where Respondent's spouse testified about how her life was more difficult and how Respondent was "not the same man" and that their marriage was deteriorating after the injury-causing incident. See *Dickerson v. St. Louis Southwestern Ry. Co.*, 674 S.W.2d, at 171-172. This is obviously an attempt to get an award for loss of consortium which is prohibited in FELA cases [E.g., *Kelsaw v. Union Pacific Railroad Co.*, 686 F.2d 818 (9th Cir. 1982)] and no instruction in the M.A.I. could be given to the jury to tell them so.

Respondent's argument merely repeats Petitioner's and fails to mention the anomaly between M.A.I. 8.02 (without the causal requirement of a "direct result") and M.A.I. 8.01 (with the causal requirement of a "direct result"). (See Petitioner's Brief at pp. 14-15.)

III.

Petitioner will reply on only two points. First, this is not the first time Petitioner has argued that the trial court's refusal of the present value instruction contributed to the excessive verdict in this case. This point was made to the Missouri Court of Appeals in Petitioner's Appellant's Brief. (See p. 6, *supra*). Second, the significance of the improper closing argument of Respondent's counsel is that it illustrates that the concept

of present value of damages in FELA cases in Missouri state courts is not only being ignored by Missouri courts but completely run over roughshod. Counsel for plaintiff is allowed to argue inflation and raises in a plaintiff's salary, but an FELA defendant cannot instruct the jury that they are to award only "money value" as required by this Court in numerous decisions as cited earlier and in Petitioner's Brief.

Unless this Court grants this Petition for Writ of Certiorari and forces Missouri courts to give a present value instruction, when requested, to juries in FELA cases tried in the state courts of Missouri, this gross violation of federal law will continue.

Respectfully submitted,

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APPENDIX

EXHIBIT M

Point VI Respondent Dickerson's Brief filed in this case before the Missouri Court of Appeals, Eastern District.

POINT VI

The Trial Court Did Not Err In Giving M.A.I. 8.02 Because Said Instruction Does Not Deprive Defendant Of The Equal Protection Guarantees Provided By The Missouri And The United States Constitutions.

Defendant claims err [sic] in the giving of M.A.I. 802 [sic] claiming that the instruction violates the equal protection clauses of the Missouri and United States Constitutions in that it improperly discriminates between railroad defendants and F.E.L.A. wrongful death and personal injury claims. A review of defendant's motion for new trial and, in particular, Point 12 will reveal that defendant's claim to err [sic] has not been preserved for ruling by this Court. Nowhere in defendant's motion for new trial did it raise the equal protection claim that defendants in personal injury actions under the F.E.L.A. were discriminated against irrationally and on an unreasonable basis when compared with the defendants in an F.E.L.A. action for wrongful death. The defendant in its motion for new trial stated:

> ...in compelling the use of said instruction (M.A.I. 802 [sic]), the Supreme Court of Missouri has deprived defendant of its rights under the equal protection of laws provision of the United States Constitution Fourteenth Amendment and the Missouri Constitution, Article 1, Section 2 and has deprived defendant of its property without due process of law in violation of defendant's rights under the Missouri Constitution, Article 1, Section 10 and has denied defendant its rights under the Federal Employer's Liability Act, 45 U.S.C.A., Sections 51 *et seq.* In that defendant is liable on damages only for injury, or death, resulting in

whole or in part from its negligence, in violation of defendant's rights under Article 6, Clause 2 of the United States Constitution." (L.F. 19-20).

Defendant did not raise in its motion for new trial the discrimination between F.E.L.A. defendants in personal injury actions and wrongful death actions. Defendant cannot now be heard to complain of the constitutional ramifications of such classification at this time. *Independent Stave Company v. State Highway Commission of Missouri,* 625 S.W. 2d 246, 249 (Mo. App. 1981). Since defendant did not raise the constitutional question at its first opportunity and renew it in its motion for new trial, it is forever barred from raising the constitutional question to this Court.

In addition, as noted previously, our Supreme Court sitting in banc in *Bair v. St. Louis-San Francisco Railway Company,* 647 S.W. 2d 507 (Mo. banc 1983), and in *Dunn v. St. Louis-San Francisco Railway Company,* 621 S.W. 2d 245 (Mo. banc 1981) has held that M.A.I. 8.02 is the proper damage instruction to be given in F.E.L.A. personal injury action. Defendant's contentions to the contrary are without merit. (See also *Marshell v. Burlington-Northern, Inc.,* 637 S.W. 2d 168 (Mo. App. 1982) and *Fisher v. Burlington-Northern, Inc.* 640 S.W. 2d 174 (Mo. App. 1982).

(A)

SUPREME COURT OF THE UNITED STATES

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY *v.* ROBERT WAYNE DICKERSON

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MISSOURI, EASTERN DISTRICT

No. 84-914. Decided March 4, 1985

PER CURIAM.

In this case, the Missouri Court of Appeals upheld a trial court's refusal to instruct the jury in a Federal Employers' Liability Act case that its award to the plaintiff should reflect the present value of any future losses the plaintiff should sustain. Because such an instruction is required as a matter of federal law, we reverse.

On December 11, 1978, respondent, a railroad policeman, was permanently disabled in a fall from a railroad car that he was inspecting for evidence of vandalism. Alleging that the fall was the result of petitioner's negligence, he brought suit under the Federal Employers' Liability Act, 45 U. S. C. § 51 *et seq.*, in the Circuit Court of the City of Saint Louis. Respondent introduced evidence that his future wage losses resulting from his injuries would, over the course of his lifetime, amount to somewhere in the neighborhood of $1,000,000.

Petitioner requested that the judge submit to the jury the following instruction:

> "If you find in favor of Plaintiff and decide to make an award for any loss of earnings in the future, you must take into account the fact that the money awarded by you is being received all at one time instead of over a period of time extending into the future and that Plaintiff will have the use of this money in a lump sum. You must, therefore, determine the present value or present worth of the money which you award for such future loss."

The trial judge refused to submit the instruction because such an instruction was not provided for in the Missouri Approved Instructions promulgated by the Supreme Court of Missouri for use in FELA cases. Accordingly, the jury instructions on damages were limited to the following:

> "If you find the issues in favor of plaintiff, then you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe he sustained and is reasonably certain to sustain in the future as a result of the fall on December 11, 1978, mentioned in the evidence. Any award you make is not subject to income tax."

The jury found that the fall was the result of petitioner's negligence and awarded respondent $1,000,000 in damages.

The Missouri Court of Appeals affirmed. 674 S. W. 2d 165 (1984). Rejecting petitioner's contention that the failure to instruct the jury on present value was error, the court held that a present-value instruction was inappropriate as a matter of Missouri law. The court's ruling was in accord with two previous opinions of the Missouri Supreme Court holding that because the Missouri Approved Instructions do not call for a present-value instruction in FELA cases, such an instruction may not be given. *Bair* v. *St. Louis-San Francisco R. Co.*, 647 S. W. 2d 507 (Mo.) (en banc), cert. denied sub nom. *Burlington Northern, Inc.*, v. *Bair*, —— U. S. —— (1983); *Dunn* v. *St. Louis-San Francisco R. Co.*, 621 S. W. 2d 245 (Mo. 1981) (en banc), cert. denied sub nom. *Burlington Northern R. Co.* v. *Dunn*, 454 U. S. 1145 (1982).

As a general matter, FELA cases adjudicated in state courts are subject to state procedural rules, but the substantive law governing them is federal. Although the Court's decisions in this area "point up the impossibility of laying down a precise rule to distinguish 'substance' from 'procedure,'" *Brown* v. *Western R. of Alabama*, 338 U. S. 294, 296 (1949), it is settled that the propriety of jury instructions concerning the measure of damages in an FELA action is an issue of "substance" determined by federal law. *Norfolk & Western R. Co.* v. *Liepelt*, 444 U. S. 490, 493 (1980). Accordingly, petitioner's contention that it was entitled to a jury instruction on present value cannot be dismissed on the ground that such an instruction is not to be found in the Missouri Approved Instructions. Whether such an instruction should have been given is a federal question.

Not only is it a federal question, but it is also one to which existing law provides a clear answer. Nearly seventy years ago, this Court held that a defendant in an FELA case is entitled to have the jury instructed that "when future payments or other pecuniary benefits are to be anticipated, the verdict should be made up on the basis of their present value only." *Chesapeake & Ohio R. Co.* v. *Kelly*, 241 U. S. 485, 491 (1916). The rationale for such an instruction is simple:

> "The damages should be equivalent to compensation for the deprivation of the reasonable expectation of pecuniary benefits that would have resulted from the continued life of the deceased. . . . So far as a verdict is based upon the deprivation of future benefits, it will afford more than compensation if it be made up by aggregating the benefits without taking account of the earning power of the money that is presently to be awarded. It is self-evident that a given sum of money in hand is worth more than the like sum of money payable in the future." *Id.* at 489.

We have never disapproved of *Kelly* or its rationale. The federal Courts of Appeals have continued to rely on *Kelly* as a definitive statement of the law applicable to FELA cases, see, *e. g.*, *Beanland* v. *Chicago R. I. & P. R. Co.*, 480 F. 2d 109, 115 (CA8 1973), and we have ourselves recently reaffirmed our adherence to *Kelly*'s principle that damage awards in suits governed by federal law should be based on present value. See *Jones & Laughlin Steel Corp.* v. *Pfeifer*, —— U. S. ——, —— (1983). Although our decision in *Jones*

& Laughlin makes clear that no single method for determining present value is mandated by federal law and that the method of calculating present value should take into account inflation and other sources of wage increases as well as the rate of interest, it is equally clear that an utter failure to instruct the jury that present value is the proper measure of a damage award is error. The Missouri courts' refusal to allow instruction of FELA juries on present value is thus at odds with federal law. The petition for a writ of certiorari is therefore granted and the judgment is

Reversed.

JUSTICE POWELL took no part in the consideration or decision of this case.

JUSTICE MARSHALL, dissenting.

I continue to object to deciding cases without granting to either party an opportunity to argue the merits by either brief or oral argument. I therefore dissent.